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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1[redacted] 1918

No. [redacted]44

THE UNITED STATES, APPELLANT,

vs.

GEORGE B. SPEARIN.

No. [redacted]45

GEORGE B. SPEARIN, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED OCTOBER 17, 1918.

(25555)
(25556)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

No. 725.

THE UNITED STATES, APPELLANT,

vs.

GEORGE B. SPEARIN.

No. 726.

GEORGE B. SPEARIN, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

I. Petition and Exhibit A. Filed Sept. 28, 1909.

In the Court of Claims.

GEORGE B. SPEARIN
against
THE UNITED STATES. } No. 30509.

Petition.

To the Honorable the Court of Claims:

The petition of George B. Spearin, a citizen of the United States, and a resident of the State of New York, respectfully represents:

That on or about the 7th day of February, 1905, a contract in writing was made and entered into between your petitioner and The United States, represented by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, whereby it was agreed between your petitioner and the said The United States that your petitioner should, immediately after the execution of said contract, commence, and within forty-two calendar months from the date thereof construct and complete, according to the plans and specifications attached to said contract, a dry dock to be located at the Navy Yard, New York, N. Y., upon the site shown on said plans, and that your petitioner should, at his own risk and expense, furnish and provide all labor and materials, tools, implements, appliances, and temporary structures of every description necessary or requisite in
2 and about the construction of said dry dock and its accessories and appurtenances in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer or such other competent officer or officers or person or persons, called in said contract "engineer in charge," as might for that purpose be designated by the said The United States; and that the said The United States should pay to your petitioner for the full and entire completion of said dry dock the sum of seven hundred fifty-seven thousand eight hundred dollars.

A copy of said contract is hereto annexed marked "Exhibit A."

Your petitioner further shows that the site where your petitioner was required by said contract to build said dry dock was originally low ground, very nearly on a level with tide water, and composed to some extent of quicksand; that prior to the time of the execution of said contract this low ground had been filled in to a depth of from 7 to 12 feet by an artificial filling of loose earth, cinders, and miscellaneous débris, which had not solidified and was easily disrupted and set in motion; that by reason of the existence of quicksand in the natural ground which formed the foundation of this site and the unsubstantial character of the filling upon this ground, it was essential to the successful prosecution of the work under said contract that water should be prevented from getting into this artificial filling and

working its way down through it into the quicksand beneath. The consequences of such a flow of water would inevitably be to loosen up the artificial filling and set it in motion toward any excavation which your petitioner might make for the dry dock to be constructed by him; and also to disturb and reduce to a fluid and uncontrollable state the quicksand which lay at the foundation of the dry-dock site. Your petitioner accordingly used every precaution which was known to him in order to exclude the flow of surface water into the dry-dock site and was successful in his efforts, so far as any water was
3 concerned of which he had any knowledge and the sources of which were under his control; but your petitioner's efforts were unavailing for the reason that, through no fault or negligence of your petitioner, but entirely through the fault and negligence of The United States, water flowed into the said filling and into said quicksand from two sources, both of which were unknown to your petitioner until such flow of water occurred, and which were beyond the control of your petitioner and entirely within the control of The United States.

One of these sources was a twelve-inch drain pipe, which discharged water into the said filling under the following circumstances:

Your petitioner began work under his contract early in March, 1905. On July 21, 1906, more than a year thereafter, and after he had made a very considerable excavation for the dry dock, during a heavy fall of rain the bank of earth on the westerly side of this excavation began to crumble away and thereupon the mouth of a twelve-inch drainpipe was disclosed. It was then flowing full under pressure and jetting water to a distance of from 8 to 10 feet from its mouth. This flow continued for a period of from twenty minutes to half an hour, washing out the earth in front of the mouth of the said drain pipe to a depth of from 8 to 12 feet and to a width of from 5 to 10 feet, casting it up against the sheet piling which your petitioner had driven around the excavation made by him for the dry dock, and forcing this sheet piling inward more than three feet.

Your petitioner further states that, although this twelve-inch drain pipe was shown on certain maps and plans which were in the possession of the United States at the time of the execution of said contract and for a long time prior thereto, and its existence and location were consequently well known to the United States, yet it is not
4 shown on any of the Government maps or plans annexed to the said contract between your petitioner and the United States for the building of said dry dock, and your petitioner was not informed and had no knowledge of its existence or location until it was disclosed on July 21, 1906, in the manner above stated.

The flow of water from this twelve-inch drain pipe, although not disclosed until it burst forth on July 21, 1906, in the manner above described, yet had evidently been going on for a very considerable period of time prior to its disclosure as above stated, as the condition of the bank for a distance of from 125 to 150 feet on each side of its mouth plainly showed. This bank had been subsiding gradually

and progressively for about four or five weeks prior to the time when the water burst forth from the mouth of the pipe on July 21, 1906, as above described, the subsidence of earth all being near the mouth of the said drain pipe and tending in that direction. The whole mass of earth on that bank had been thus undermined and disintegrated and set in motion toward the sheet piling on the westerly side of the dry-dock excavation, bending the sheet piling in toward the excavation and twisting and distorting it so as to render it useless.

This flow of water did not come from within the area set aside for your petitioner for the building of said dry dock, and it did not result from any of his operations; but it came from a source which was entirely beyond the control of your petitioner and within the control of the United States.

The other of the two sources from which water flowed into the filling and into the quicksand, as above stated, was a six-foot sewer which burst and allowed water to escape under the following circumstances, viz:

Prior to and at the time of the execution of said contract there was an intercepting sewer extending directly across the dry-dock site where your petitioner was required by his contract to construct said dry dock, and the specifications annexed to the said contract between the United States and your petitioner directed, in paragraph 196 thereof that this interesting sewer should be diverted around the head of the dry dock as shown on sheet 3 of the plans annexed to said contract and specifications; and in paragraphs 8 and 9 of said specifications it was further provided that immediately after the execution of said contract your petitioner should commence the work of so diverting this intercepting sewer and should complete the same within six months from the date of said contract. The said plans and specifications specified particularly the dimensions, material, and location of said sewer, and your petitioner constructed the same strictly in accordance with the said plans and specifications, and the same so constructed was duly accepted by the United States.

About a year after said sewer had been so completed by your petitioner and had been accepted by the United States, as aforesaid, during a heavy fall of rain, on the afternoon of August 7, 1906, without any fault or negligence on the part of your petitioner, the said sewer burst in the part which had been so constructed by your petitioner, causing longitudinal openings in the top, and water flowed through these openings in large volume down into the excavation for the dry dock already commenced by your petitioner.

The said bursting was caused by internal pressure from the water which flowed into said sewer by reason of the fact that the sewer was not large enough to carry off this water.

After the sewer had burst, as above described, your petitioner learned for the first time that it was, and had been for a long time prior thereto and prior to the execution of said contract, of insufficient capacity to carry off the water which flowed into it from the

drainage area which it was required to serve, and that as a consequence of this insufficient capacity whenever there was an
6 unusually heavy quick fall of rain the said sewer was subjected to very severe internal pressure from this water; that as a result of this internal pressure the water had at sundry times prior to the execution of said contract forced the covers from the manholes opening into the sewer and had overflowed through these manholes into the streets of the navy yard, where your petitioner was obliged by his contract to carry on the work of constructing said dry dock, flooding said streets and the surrounding ground sometimes to a depth of two feet or more; that the said sewer was only about one-third of the necessary capacity to carry off the water which flowed into it from the drainage area served by it and was liable to burst at any time on account of the internal pressure from this water.

Your petitioner further states that he was entirely unacquainted with said premises and never saw them until he examined them for the purpose of making his contract for said work; that there was at that time nothing about or upon said premises that indicated the insufficient capacity of said sewer and the consequent great internal pressure of water therein and the resultant flow of water through the manholes and the flooding of the streets and ground in the navy yard and vicinity as above set forth; that such insufficiency and such flooding were not known to your petitioner at the time of the execution of said contract and could not have been ascertained by him by the exercise of reasonable and ordinary care; but that it was all well known to the United States at the time of the execution of said contract and for a long time prior thereto; yet the United States wholly neglected and failed to notify your petitioner of the existence of said insufficiency and the consequent flooding as aforesaid.

Your petitioner further states that he would not have signed said contract nor undertaken the work of constructing said dry dock had he known of the insufficient capacity of said sewer and of the consequent internal pressure of water upon it.

7 The bursting of said sewer, as above described, created a situation which made it impossible for your petitioner to continue the work of constructing said dry dock with safety. The said sewer as diverted by your petitioner in compliance with his contract, stood immediately at the head of the excavation which your petitioner was then making for the said dry dock, said excavation being about fifty feet distant from said sewer. The earth between the sewer and the excavation sloped naturally toward the excavation which formed a convenient receptacle for it when once set in motion. Upon the bursting of said sewer on August 7th, 1906, as above described, the water poured through the openings in the sewer thus created and flowed down along the piles which formed the foundation of the sewer and into the earth alongside of it, gradually disintegrating this earth and setting the whole mass in motion toward the excavation.

The foundation of the sewer was thus undermined, the earth around it was set in motion from the sewer toward the excavation and there was imminent danger that the sewer, being thus deprived of its support, would break in two and all the sewage and flow of water intended to pass through it be discharged into the dry dock excavation. The consequences would have been the undermining of the banks on each side of the excavation upon which rested buildings and other property of great value belonging to the United States and to your petitioner, and the consequent precipitation of these buildings and property into the excavation, causing enormous loss to your petitioner and to the United States.

With the aid of experts in such matters, your petitioner at once caused a thorough examination to be made of the conditions surrounding the sewer and the dry dock excavation, for the purpose of determining whether it was safe in these circumstances to proceed with the performance of the work which the contract required
8 him to do. After an exhaustive investigation your petitioner was advised by said experts, and believed, that it was unsafe for him to go on with the construction of said dry dock unless the danger from the sewer above mentioned was removed.

In the course of said investigation it was ascertained that the said sewer was only about one-third of the necessary capacity to carry away the water which came to it from the drainage area which it was required to serve, and that it was liable to burst at any time on account of the internal pressure from this water.

Your petitioner immediately gave notice to the United States of the bursting of the sewer and of the danger that existed from that source, stating that the sewer had burst from internal pressure by reason of its insufficient capacity, and that your petitioner was not responsible for it in any way; and your petitioner demanded of the United States that it do whatever was necessary to remove the danger caused by the existence and location of said sewer in order that your petitioner might prosecute his work in safety.

The United States refused to comply with this request and made no attempt to remedy or make safe the said unsafe conditions; but demanded that your petitioner proceed with the work mentioned in his contract. Your petitioner refused to proceed with the contract until the said conditions had been made safe, and the United States thereupon, on February 7, 1907, appointed a board of inquiry consisting of Captain Perry Garst and Civil Engineers Homer R. Stanford and Reuben E. Backenhus, all of the United States Navy, for the purpose of investigating and ascertaining the circumstances and the facts connected with the damages done to the excavation, piles, and other work under the contract between your petitioner and the said The United States. The precept appointing this board was issued out of the Navy Department of the United States and bears date February 7, 1907, and states that the principal causes of
9 such damages are reported to have been leakage from the concealed twelve-inch drain pipe above mentioned, and the

bursting of the six-foot sewer, also above mentioned. The board was directed by said precept to consider especially those two matters with a view to aiding the department to determine whether or not your petitioner should be held responsible under the terms and provisions of his contract for the damages resulting from those causes. The said precept further provided that the board's investigation should be as thorough and complete as practicable, and that your petitioner should be given full opportunity to appear before it personally and by counsel and to submit such evidence and representations as he might desire to have considered. The said precept further directed that the said board should, on the conclusion of its investigation, report to the United States Navy Department fully the results thereof and make recommendation as to what steps should in its judgment be taken from an engineering point of view to insure the safe and successful continuation of the work on the dry dock, so far as the same might be affected by danger from the sewer.

The said board met and proceeded with its investigation as directed by said precept, and such proceedings were thereupon had that the said board rendered its report in writing upon the matters so directed to be investigated, bearing date March 30, 1907, and duly filed in the Navy Department of the United States.

In and by said report the said board found that water had flowed from the twelve-inch drain pipe as hereinbefore set forth, and that such flow did not come from within the area set aside for your petitioner and did not result from any of his operations.

The board also found that the six-foot sewer had burst and discharged water at the time and in the manner above described; that the portion of such sewer which was constructed by your petitioner had been completed by him in accordance with his contract and so accepted by the officer in charge; and that it burst from internal pressure caused by the flow from a storm of a magnitude to be expected at the time of the year it occurred. The said board further in its report recommended certain changes in respect to the said sewer and in the plan of the said dry dock in order to make the construction of said dry dock safe.

After the said report had been filed, on the initiative of the Navy Department of the United States at Washington, negotiations were opened between the United States and your petitioner, with a view to a settlement of the matters in controversy between them. At the suggestion of said Navy Department, your petitioner submitted figures which it seemed to him might form a basis of settlement. These figures took into account, among other things, the value of the plant and materials owned by your petitioner in connection with the construction of said dry dock; and the negotiations were adjourned until inquiry could be made by the United States as to the correctness of these figures. Upon the conclusion of this inquiry the figures were carefully gone over by the Navy Department and your petitioner, and a very considerable reduction was made by the said Navy Depart-

ment. After a full discussion, an amount was finally agreed upon which the said department was willing to pay and which your petitioner was willing to accept in full settlement of all claims in controversy growing out of the said dry dock or of anything done in connection therewith.

Subsequently, however, your petitioner received a letter from the Secretary of the Navy bearing date June 13, 1907, stating that the said department, after further consideration of the matter, had decided not to conclude the agreement of settlement with your petitioner, and advising your petitioner that the department held him responsible for the break in the six-foot sewer, and for the injuries resulting therefrom, and from all other causes from the work
11 under said contract, and for the delay in proceeding with the construction of said dock, and requesting your petitioner to resume operations under the contract without further delay and continue the same to the fulfillment of his obligations in the premises.

Your petitioner further shows that under the conditions disclosed and developed in connection with the said sewer and drain pipe, wholly without fault or negligence on the part of your petitioner, and solely through the fault and negligence of the United States, it became and was impossible for your petitioner to proceed with safety in the performance of said contract unless the United States took such measures as would have been adequate to protect the proposed dry dock as well as the property of your petitioner employed by him in the prosecution of said work, and also the property of the United States in the immediate vicinity; but the said United States, although specifically requested so to do neglected and refused to take any measures whatever to render safe the said unsafe conditions and to enable your petitioner to proceed with said work with safety.

Your petitioner thereupon protested and remonstrated in writing against this action on the part of said Navy Department, and demanded to be informed whether the United States intended to carry out the recommendations of its board of inquiry made for the purpose of rendering the construction of said dry dock safe. The said United States, however, paid no attention to said protest and demand, and never carried out the recommendations of said board; but subsequently, on November 14, 1907, declared said contract forfeited by your petitioner for failure to make proper progress with the work of constructing said dry dock under said contract, and further declared said contract null and void; and thereupon, notwithstanding the protest and remonstrance of your petitioner, took forcible possession of your petitioner's plant and property at the navy yard, which he
12 had there constructed and assembled for the prosecution of his work, and without any fault, cause, or reason for the same on the part of your petitioner, stopped the work under said contract and prevented your petitioner from continuing any work thereunder and completing the same, and your petitioner, compelled thereto by the said United States, and without any fault on his part, did discontinue and suspend the said work under said contract, although he

was fully equipped to carry on and continue said work, and had expended a large amount of money in materials and supplies and equipment necessary to carry on and complete the same, and was ready, able, and willing to carry on and offered to carry on and complete the same, provided the United States would do the things that were necessary to be done by it, as above mentioned, in order to enable your petitioner to carry on the said work in safety.

That in preparing for and performing the work specified in the said contract and specifications, the reasonable and necessary expenses of your petitioner amounted to the sum of three hundred and twenty-eight thousand six hundred and one 78/100 dollars, and that a reasonable and fair allowance to your petitioner for his services in and about the carrying on of the said work would be the sum of eight thousand three hundred and eight 33/100 dollars, and that the reasonable and legitimate profits which your petitioner would have realized and obtained had he been permitted to complete the said contract is the sum of one hundred and five thousand dollars, making all together the sum of four hundred and forty-one thousand nine hundred and ten 11/100 dollars, on which your petitioner has received from the said the United States the sum of one hundred and twenty-nine thousand seven hundred and fifty-eight and 32/100 dollars, leaving a balance due and owing to your petitioner of the sum of three hundred and twelve thousand one hundred and fifty-one 79/100 dollars, which the said United States has refused and still refuses to pay, although demand therefor has been duly made.

13 Your petitioner further shows that the said United States has refused to pay the claim above stated; that no other action has been had on said claim in the departments of the United States than that above stated; that your petitioner is the sole owner of said claim and the only person interested therein; that no assignment or transfer of said claim or any part thereof or interest therein has been made; that your petitioner is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States; that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that he believes the facts as stated in the foregoing petition to be true.

Wherefore, your petitioner prays judgment against the United States for the sum of three hundred and twelve thousand one hundred and fifty-one 79/100 dollars.

GEORGE B. SPEARIN.

Dated September 21, 1909.

STATE OF NEW YORK, } ss.
County of New York. }

George B. Spearin, being duly sworn, says that he is the petitioner in the above-entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own

owledge, except as to such matters as are therein stated to be eged upon information and belief, and that as to those matters he ieves it to be true.

GEORGE B. SPEARIN.

Sworn to before me this 27th day of September, 1909.

[L. S.] AUGUST C. WAETERLING,
Notary Public, N. Y. Co.

FRANK W. HACKETT,
For Claimant.

Exhibit A.

[Contractor's original copy of contract No. 1167. In quadruplicate, 3d.]

ntract for the construction of a dry dock to be located at the United States Navy Yard, New York, N. Y.

This contract, of two parts, made and concluded this seventh day February, A. D. 1905, by and between George B. Spearin, a citizen New York, having an office at No. 17 Battery Place, in the city of w York, acting for himself, his heirs, executors, and administra-s, party of the first part, and the United States, represented by rdecai T. Endicott, Chief of the Bureau of Yards and Docks, vy Department, acting under the direction of the Secretary of Navy, party of the second part, witnesseth, that

Whereas an act of Congress, approved June 7, 1900, authorizes the nstruction of a granite and concrete dry dock to be located at the vy yard, New York, N. Y.; and

Whereas, by due advertisement, proposals were invited by the ief of the Bureau of Yards and Docks, Navy Department, for construction, by contract, of a dry dock of the general dimensions d to be located at said navy yard at the place shown by the plans d specification therein referred to; and

Whereas the proposal of the said party of the first part, dated December 31, 1904, to construct a dry dock to be located at the United States Navy Yard, New York, N. Y., according to items 1, 3, 6, and 9, paragraph 268, of specification hereinafter mened, for the sum of seven hundred and fifty-seven thousand eight ndred dollars ($757,800), has been duly accepted by the party of e second part:

Now, therefore, in consideration of the premises, and for and in nsideration of the payments to be made as hereinafter provided r, the party of the first part, for himself, his heirs, executors and ministrators, does hereby covenant and agree to and with the party the second part as follows, that is to say:

First. The party of the first part will, immediately after the exetion of this contract, commence, and within forty-two calendar onths from the date hereof, construct and complete, according to

the plans and specifications hereto attached—with modifications as contemplated by the items above mentioned—a dry dock, hereinafter referred to as the said dry dock, to be located at the navy yard, New York, N. Y., upon the site shown on said plans, and will, at his own risk and expense, furnish and provide all labor, materials, tools, implements, appliances, and temporary structures of every description—all of which shall be of the best kind and quality adapted for the work as described in the specification—necessary or requisite in and about the construction of said dry dock and its accessories and appurtenances, in accordance with the aforesaid plans and specification, subject to the approval of the civil engineer, or such other competent officer or officers or person or persons hereinafter called officer in charge, as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that such officer in charge shall and may, from time to time during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he may deem not in strict conformity with the spirit and intent of this contract and with the
16 aforesaid plans and specification, and to cause any inferior or unsafe material or work to be taken down or out, by and at the expense of the party of the first part; and that all such rejected material shall be at once removed from the said navy yard and station and replaced by material satisfactory to such officer in charge, and that all such inferior or unsafe material or work shall be replaced by satisfactory material or work by and at the expense of the party of the first part. Such officer in charge shall, at all times during the progress of the work, have full access thereto, and the party of the first part shall furnish him with full facilities for the inspection and superintendence of the same.

It is further stipulated and agreed that all necessary and suitable precautions shall be taken by the party of the first part, during the progress and until the final completion of said work, to avoid or prevent accidents; and that the party of the first part will indemnify and save harmless the party of the second part from all claims against the United States, and from all actions and proceedings at law, or in equity, and from all costs and damages for or by reason of any injury to person or property, resulting from, or directly or indirectly attributable to, any accident or accidents which may occur in or during the prosecution of the said work and in connection therewith or any part thereof, or to any carelessness or negligence, willful or otherwise, of any person or persons employed by the party of the first part, or to the use of improper or defective materials, or to any act or omission of the party of the first part prior to the final acceptance of the said dry dock by the party of the second part.

Second. The party of the first part shall designate a competent representative or foreman to be present upon the work, authorized to act for it in all matters connected with the same, and to receive

and follow directions relating thereto when given by the officer in charge, and for all acts and omissions of such representative
17 or foreman in the premises the party of the first part shall be wholly responsible.

Third: The party of the first part will, from time to time during the progress of the said work, remove all refuse material and rubbish connected therewith as the same may accumulate, and any portion of such refuse material or rubbish which the party of the first part may agree to deposit within the limits of said navy yard and station shall be so deposited by the party of the first part, at its own expense, where the officer in charge may direct. On the completion of the said dry dock the surroundings shall be thoroughly cleaned up, and filled and graded to the established level or levels of the station as set forth in said specification, and all plant and surplus material shall be removed by and at the expense of the party of the first part, without unnecessary delay.

Fourth. The party of the first part shall hold and save the United States harmless from and against all and every demand or demands of any nature or kind, for or on account of the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, or appliance which has been or may be adopted or used in or about the construction of the said dry dock, its accessories and appurtenances, or any part thereof, under this contract, or its use after completion, and to protect and discharge the Government from all liability on account thereof by proper releases from patentees, or otherwise, and to the satisfaction of the Chief of the Bureau of Yards and Docks, before final payment under this contract shall be made, except in the case of such methods, constructions, and appliances for which the Government owns the right or has received license.

Fifth. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specification aforesaid, subject to modi-
18 fication as aforesaid, which plans and specification are hereto annexed, and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the plans or specification of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the party of the first part, and all claims for extra compensation by reason of, or for or on account of, such performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specification shall not be changed in any respect, except in the manner provided in said specification. And the party of the first part further covenants, agrees, and promises that he will promptly execute all necessary and proper agreements supplemental

to this contract to carry into effect any change or changes made in this contract under the provisions of paragraph No. 17 of the specification aforesaid: Provided, That no change so made shall in any manner affect the validity of this contract or the bond given to secure its fulfillment.

Sixth. The said dry dock and its accessories and appurtenances, and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans, and specifications, to the satisfaction of the party of the second part.

And this contract further witnesseth:

Seventh. That the party of the second part, for and in consideration of the foregoing, and for and in consideration of the faithful performance of this contract by the party of the first part, duly
19 certified to by the officer in charge, and the acceptance of the work as satisfactory on the part of the United States, hereby covenants and agrees, to and with the party of the first part, that there shall be paid to the said party of the first part, for the full and entire completion of the said dry dock as aforesaid, the sum of seven hundred and fifty-seven thousand eight hundred dollars ($757,800), upon approved bills certified and drawn in the usual manner, and payable through such navy pay office as the party of the first part may elect, in the following manner, viz., as provided in paragraph 29 of the specification aforesaid.

Eighth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, nor any officer of the United States, naval, military, or civil, is or shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; that this contract shall not, nor shall any interest therein, be transferred by the party of the first part to any person or persons, and that any such transfer shall subject the party of the first part to a forfeiture of its rights hereunder, all right of action to recover for any breach of this contract being, however, reserved to the United States.

In witness whereof, the respective parties have hereunto set their hands and seals the day and year first above written.

Signed and sealed in presence of:

GEORGE B. SPEARIN. [SEAL.]

GEORGE THOMAS,
as to GEORGE B. SPEARIN.

THE UNITED STATES,
By MORDECAI T. ENDICOTT,
Chief of Bureau of Yards and Docks,
acting under the direction of the Secretary of the Navy.

WM. M. SMITH,
as to M. T. E.

20 *II. Traverse. Filed May 8, 1911.*

In the Court of Claims of the United States. December Term, A. D.

GEORGE B. SPEARIN,
vs.
THE UNITED STATES. } No. 30509.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.
A. B.

21 *III. History of proceedings.*

On May 8, 1911, the defendants filed a motion to dismiss, which was ordered to the law calendar for argument.

On February 12 and 13, 1912, the motion to dismiss was argued and submitted.

On April 1, 1912, the court filed an order overruling the defendants' motion to dismiss.

On December 14, 1914, the case was argued by Mr. Alfred S. Brown for the claimant and by Mr. Philip M. Ashford for the defendants.

On December 15, 1914, Mr. Ashford continued his argument; Mr. Charles E. Littlefield concluded for the claimant and the case was submitted.

On May 24, 1915, the court filed findings of fact and conclusion of law and entered judgment for claimant in the sum of $151,180.86, with an opinion by Booth, J., and a dissenting opinion by Campbell, Ch. J.

On August 17, 1915, the claimant filed a motion to amend findings and judgment.

22 On October 5, 1915, the defendants filed a motion to amend findings of fact and for a new trial.

On October 11, 1915, the above motions were ordered to the law calendar for argument.

On October 25, 1915, the claimant filed objections to defendants' motion to amend findings of fact.

IV. Argument and submission of motions.

On October 28, 1915, the claimant's and defendants' motions to amend findings and for new trial were argued and submitted by Mr. Alfred S. Brown, for claimant, and Mr. Philip M. Ashford, for defendants.

23 *V. Order of court on motions. Filed Apr. 13, 1916.*

It is ordered by the court that the defendants' motion to amend findings and for new trial and the claimant's motion to amend findings and judgment be, and the same are hereby, allowed in part and overruled in part.

The former findings of fact, conclusion of law, and opinions are vacated and set aside and new findings of fact and conclusion of law filed entering judgment for the claimant in the sum of $141,180.86.

Opinion by Judge Booth; dissenting opinion by Campbell, Ch. J.

24 *VI. Findings of fact, conclusion of law, opinion by Booth, J., and dissenting opinion by Campbell, Ch. J. Filed April 13, 1916.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact.

I.

On the 7th day of February, 1905, the claimant, George B. Spearin, entered into the contract with the United States, a copy of which, marked "Exhibit A," is annexed to the petition herein and a copy of the material parts of the plans and specifications mentioned in said contract is hereto attached, marked "Exhibit B," and made a part hereof.

II.

The site of said dry dock was upon low ground, nearly on the level of tidewater. To the south of said site and closely contiguous thereto was a paved street called Morris Avenue. To the eastward of said site was another paved street known as Fifth Street. Beneath the surface of said streets were numerous supply pipes for water, gas, heat, etc. Lying to the eastward about 150 feet, generally parallel with the axis of the dry dock, was a 7-foot sewer, while intercepting said sewer near the head of said site and passing between the same and Morris Avenue was a 6-foot sewer. There were numerous valuable and important buildings belonging to the Government, in which shops and workrooms of various kinds were located at distances from said site ranging from 150 to 300 feet. There was a 30-inch salt-water intake pipe extending from the water front at Wallabout Basin to the power house, passing for some distance within about 150 feet of the head of the site for said dry dock.

III.

At the time of the advertisement for proposals for the construction of said dry dock, and for many years prior thereto, there was a 7-foot sewer lying eastward of the proposed dry dock upon the
25 property of the defendant and outside of the space set aside by the defendant for the performance of claimant's work.

Said sewer emptied through four 24-inch vitrified sewer pipes into Wallabout Basin at a point near the entrance of the dry dock where hospital ships were frequently anchored and a Government hospital located at least one-half mile distant. There was also at said time a 7-foot intercepting sewer made of brick which intersected the 7-foot sewer at a point southeast of the dry dock and extending across the site of the proposed dry dock near the head thereof, emptying into the East River at a point near the northwest corner of the navy yard, several hundred yards from the site of the dry dock, said point of intersection being also outside the limits of claimant's inclosure and upon the property of the defendant. Both of said sewers were of brick construction and were main outlets for the sewerage system of the city of Brooklyn and drained a considerable part of the territory of that city, as well as the territory within said navy yard. Brick sewers are not designed to resist internal pressure.

About the year 1900 the course of the said 6-foot sewer, as it then ran through the navy yard, was changed so as to permit of its emptying into the East River as aforesaid. The expense incident to changing its course was borne by the city of Brooklyn and the United States together.

IV.

In the 7-foot sewer a dam from 5 to 5½ feet high had been built several years (probably about the year 1900) before the signing of the contract which diverted the water into the 6-foot sewer until it rose high enough in said 7-foot sewer to pass over said dam. The presence of said dam and said four 24-inch pipes in the outlet of said 7-foot sewer reduced the combined capacity of said 6 and 7 foot sewers. This 7-foot sewer if left free and unobstructed had a capacity of about 423 cubic feet per second. The 6-foot sewer had a capacity of about 124 cubic feet per second, and the combined capacity of the two sewers was therefore about 547 cubic feet per second. The damming up of the 7-foot sewer threw practically all the flow of water in both sewers into the 6-foot sewer. Said dam did not appear on the plans or any blue prints exhibited to the contractor.

V.

The specifications provided (pars. 8 and 9, 196 to 198) that said 6-foot sewer extending across the site of the dry dock should be diverted by the contractor immediately after the signing of the contract around the head of the dock upon the arc of a circle, as shown on the plans annexed thereto, and that it should be completed within a period of six months, the character of construction provided for the diverted section being identical with that of the old 6-foot sewer, both as to its size and material.

Said location of the diverted section of the sewer placed it at a distance varying from 37 to 50 feet from the proposed excavation of the dry dock and a large part of it within the area set aside for the space within which the contractor's operations were to be carried on.

26

VI.

For a number of years prior to the date of the advertisement i viting proposals for the construction of said dry dock said 6 and foot sewers had overflowed at sundry times as the result of sudd and heavy downpours of rain, causing the water to flow out from t manholes, catch basins, and other outlets of each of said sewers a flooding the lower portions of the navy yard and contiguous portio of the city of Brooklyn. Said conditions of overflow were general known to persons living in the vicinity of said area and were know to Mr. Hollyday, the officer in charge of said work at the navy yar to his subordinates, and other persons in and about the navy yar as well as to the civil engineer in charge of the Brooklyn sew system.

The claimant had no knowledge of nor did he or his representativ make any inquiry concerning said sewers or the overflowing or c pacity of or internal pressure in either of them. He was not inform of the fact that said sewers had overflowed by said officer in char or anyone else. Some other bidders were so informed. Prior to t date of said contract and for a year or more thereafter, the exi ence of said dam in the 7-foot sewer was not known to the city civil engineer and was not shown on any city maps, nor was its pr ence actually known to any of defendants' officers or agents concern with said contract or the making of said plans until after the bre in the sewer hereafter mentioned. The sewer was underground, a the dam was invisible.

VII.

Prior to submitting the proposal upon which the contract w subsequently awarded the claimant, who was not a civil engineer, pe sonally visited the site of the proposed work and made a superfic examination thereof. The claimant also sent one or two represent tives to the civil engineer's office at the navy yard to obtain wh information they could concerning the conditions and probable c of the work.

VIII.

Immediately after the contract was signed the claimant beg and completed within the time specified the construction of t diverted section of the 6-foot intercepting sewer, according to t plans and specification, and the same was approved, accepted, a paid for by the United States, and the claimant proceeded with t construction of the dry dock.

IX.

Said intercepting 6-foot sewer was at no time disturbed or in a manner affected by the excavation for the dry-dock prism, and mained in constant use for about a year after its completion with injury or accident of any kind.

On the 7th day of August, 1906, a sudden and heavy downpour of rain occurred and coincident with it was a high tide, which forced water a considerable distance up the sewer to a depth of 2 feet or more; and during that period the sewers in the vicinity of the navy yard overflowed, and the said 6-foot sewer broke in the part
27 constructed by the claimant, causing longitudinal cracks in three places in its top for a total length of 35 feet at a point opposite the head of the dry dock and about 50 feet therefrom, through which cracks water flowed into the excavation for the dry dock. Said break in the sewer was caused by internal pressure of water from the sudden and heavy downpour of rain in conjunction with said existing high tide, which the sewer was not of sufficient size to carry away, and because said dam in the 7-foot sewer greatly reduced its capacity.

X.

Immediately after said cracks in the sewer occurred it was inspected by the contractor, who thereupon wrote the defendants' officer in charge, notifying him of its condition and stating his purpose to suspend operations and not to resume until the Government had made provision for caring for or assuming the responsibility for the damage that had been or might be occasioned by the said sewer, its insufficient capacity, and location.

The chief of the bureau replied to said notification that the contractor was responsible for remedying the existing conditions and that he should make good the injuries which had been caused, guard against their repetition, and proceed with his work under the contract.

Thereafter much correspondence was had between the claimant and the Chief of the Bureau of Yards and Docks, and finally an appeal was taken by claimant to the Secretary of the Navy, who, on January 14, 1907, called upon the claimant to proceed with his work under his contract, and if he proposed to decline to do so notify the department that it might take such steps as it deemed advisable. On January 25, 1907, the Secretary asked for a reply to said letter and stated that before annulling his contract the department would give him further opportunity to show cause why that action should not be taken.

On January 29, 1907, the plaintiff, acknowledging receipt of said two letters from the Secretary, stated, among other things, as follows:

"You must recognize that the main point at issue is not as to who is responsible for what has occurred, but what is to be done for the future. Unquestionably a grave blunder has been made in the design of this sewer, and again in locating it where it is around the head of this dry-dock structure within the line of the natural slope of the excavation. Such conditions render it impossible for me to comply with your demand that I proceed with the work without modification of the sewer plan.

"We know now beyond a shadow of a doubt that this sewe
insufficient in size and strength for the work that it must do,
that it will be a constant menace to my plant, to the dry dock it
and to the Government's surrounding property. I have no po
to change the plan or location of the sewer, even if I would, nor
I bring myself to believe that it is the desire of your departmen
perpetuate this blunder by leaving this sewer as it is and where it
a constant menace to the final success of this important work. W
ever your attitude may be I desire to say at this time that I be
it to be extremely dangerous and unwise to continue this work
proper provision has been made for the proper control of
28 large flow of water, and in this I am borne out by the best
gineering opinion that I can obtain. I am therefore unwi
to resume work until this menace has been removed, and I again
on your department to make such changes in the design and loca
of this sewer as will make it possible to resume work with safet
my men, to my plant, and to the surrounding Government prop
and this dry dock."

Thereupon, on February 7, 1907, a board of investigation was
pointed by the Secretary of the Navy under provisions of the s
fications, which heard many witnesses, including those called by
claimant, who appeared before the board and was represented
counsel during its investigation. The board made its report
which the contractor filed a number of exceptions. The estim
cost of restoring the sewer in as good condition as it was at the
it was completed and accepted, as aforesaid, was $3,875, accor
to an estimate made by an officer of the Navy appointed by the
of the bureau.

It was unsafe to the contractor's and the Government's prop
for the contractor to proceed with the contract work with the 6
sewer in its then condition.

XI.

On the 14th of November, 1907, the Secretary of the Navy decl
the claimant's contract null and void in accordance with the fift
and sixteenth clauses of the specifications and other provisions
tained therein, and due notice thereof was served upon the clai
upon the same day. On the following day the defendants
formal possession of the plant and materials of the claimant a
the dock site.

XII.

The claimant paid, laid out, and expended in and about the
formance of the work specified in said contract the following
to wit:

Value of work and materials incorporated in the permanent structure	875. 4
Value of materials on hand to be placed in the permanent structure	10. 8
Value of plant	124. 7

Making a total amount of $210,939.18, exclusive of interest.

The claimant received from defendants on account of such performance the sum of $129,758.32, leaving a balance of $81,180.86 actually expended by him in and about the performance of said contract over and above the amounts received by him from defendants on account thereof.

The claimant, if permitted to finish his contract work, would have earned a profit of $60,000.

Included in these items of expenditure as part of the plant is the sum of $38,138.80 for 1,028 steel sheet piles driven in place. Said steel sheet piles were of no use or value whatever in the work of completing the construction of said dry dock and possessed no salvage value.

29 XIII.

Subsequently, on April 14, 1908, the contract without change was relet to the Williams Engineering & Contracting Co. for $764,400. Sluice gates were thereafter erected in both the 6 and 7 foot sewers, which tended to reduce the leakage therefrom. On August 31, 1908, the plans and specifications were changed and a supplemental agreement was entered into with the Williams Engineering & Contracting Co., increasing the amount of their contract by $442,782.16, the dock being increased in length under this change to 585 feet from the coping to the outer sill and 601 feet from the coping over all. The width of the dry dock was also changed, and the lining of the dry dock was changed from concrete to granite, quarry faced. The amount paid to said company on account of work performed was $65,738.06, and on October 1, 1909, the contract was canceled. The contract with this company provided that this company should have the use of the claimant's plant and materials.

The work was then relet on November 12, 1909, to the Holbrook, Cabot & Rollins Co., and their bid, on the basis of the dry dock as changed under the Williams Engineering & Contracting Co. contract, was $1,389,000. On September 1, 1910, another change in the plans and specifications was made, increasing the size of the dry dock to 723 feet, as against 554 feet originally in the Spearin contract, and increasing their bid by $1,189,309.78. They had then been paid $1,072,863.46. The last change involved the omission of piles under the dock and the substitution of piers and anchors sunk in pneumatic caissons, and also involved the omission of the sewer around the head of the dock and certain miscellaneous items. The damaged 6-foot sewer was removed from the site and its exposed ends made as nearly water-tight as possible by the erection of sluice gates therein and reinforced concrete bulkheads and the flowage of water through the same entirely stopped during the continuance of the work under this contract, the dam having been previously removed from the 7-foot sewer. Again on January 7, 1911, certain increases in the contract price were made, among others for the sewer around the head of the dry dock $7,200. The total cost, ex-

cluding payments made under other contracts to the Holbrook, Cabot & Rollins Co., was approximately $2,480,000.

After the completion of the dry dock the 6-foot sewer, which had been removed as aforesaid, was reconstructed by the said Holbrook, Cabot & Rollins Co., according to plans and specifications prepared by defendants. The sewer as finally constructed was made of reinforced concrete 5 feet wide and 6 feet high, rectangular in shape, the concrete being reinforced by twisted steel rods three-quarters of an inch square placed both longitudinally and transversely 18 inches apart on the sides and 36 inches at the top and bottom. The side walls were 6 inches thick, the bottom 8 inches, and the top 10 or 12 inches—a detailed construction designed to resist internal pressure.

XIV.

Said Holbrook, Cabot & Rollins Co. completed the construction of said dry dock, and from time to time as the items of plant, tools, and appliances furnished by claimant became of no further use in the work of completing the construction of said dry dock they were returned to the possession and control of the Navy Department. Subsequently, after notice to claimant to remove said items of plant, etc., and upon his failure so to do, the same were duly advertised and sold at public auction, the net proceeds of said sale amounting to $4,407.98, which amount was deposited with the assistant United States treasurer at New York and credited to the fund for "Miscellaneous receipts, proceeds of sale." At the time of the closing of the testimony in this case there were still some items of said plant in use by said corporation. The reasonable value of these items at the time was $3,500.

Conclusion.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment of and from the United States under Finding XII in the sum of one hundred and forty one thousand one hundred and eighty dollars and eighty-six cents ($141,180.86).

Opinion.

Booth, Judge, delivered the opinion of the court:

On February 7, 1905, the claimant, George B. Spearin, entered into a written contract with the defendants to furnish the materials and do certain construction work which was intended to finally result in the completion of a dry dock at the New York Navy Yard. All the work incident to the undertaking was provided for by plans and specifications prepared by the Bureau of Yards and Docks, and the contract itself was signed by Mordecai T. Endicott, chief of said bureau, as the representative of the United States.

Congress by the act of June 7, 1900, had authorized the building of the dry dock and made an appropriation therefor. Previous to the advertisement for bids the Government officers in charge of the proposed work had agreed upon a location for the dry dock that embraced within its territorial limits a 6-foot intercepting brick sewer, and the same appeared in the plans and specifications. This brick sewer extended clear across the site of the dock near the head thereof and was a part of the sewer system of the city of Brooklyn. Alongside the eastern limits of the site as fixed by the contract was another brick sewer 7 feet in diameter, the two sewers intersecting each other at a point southeast of the proposed dock entirely outside the contractor's lines of operation fixed by the contract.

The contract provided for what was obviously indispensable, i. e., that the contractor should first divert the 6-foot sewer around the head of the dock upon the arc of a circle, thus removing it from interference with the building of the dry dock and as a menace to the completed work. The work to be done on the sewer was provided for by the defendants in plans and specifications prepared and furnished the contractor by the defendants. The sewer work was done by the plaintiff in strict accord with the contract, was inspected, accepted, and paid for by the defendants in the manner provided in the contract. The plaintiff assembled his plant and necessary materials and began work on the construction of the dry dock proper.

31 The contract work proceeded in the usual way until August 7, 1906, on which date a sudden and heavy downpour of rain occurred, which, in conjunction with a high tide, caused the 6-foot sewer previously constructed by the plaintiff to burst, the disaster being of sufficient consequence to flood that portion of the excavation already completed by the plaintiff and endanger future work if the sewer remained in its present condition. The plaintiff immediately stopped work and notified the defendants that he would not resume until the Government made some provision for caring for or assuming the responsibility for damages that had been or might hereafter be occasioned by said sewers. An investigation of the surroundings disclosed the following indisputable facts: It was a matter of knowledge, known generally by persons living in the navy yard and territory immediately adjacent thereto, that the sewerage system in this particular locality was seriously inefficient. For a number of years preceding this occasion, under exactly similar circumstances, these very sewers in the navy yard had overflowed, blowing the iron tops off catch basins and manholes and flooding the yard itself with water to a considerable depth. The officers and men of the navy yard and the officers of the city of Brooklyn in charge of sewers knew it and had known it for years. The officer in charge of the dry dock construction work knew it and had known of it for a considerable time before this contract was let.

Inside the 7-foot sewer, heretofore described as to location, a brick dam 5 or 5½ feet high had been built several years before the contract for the dry dock was let, which, in conjunction with some small drain

pipes installed at its mouth, diverted a large volume of sewage into the 6-foot intercepting sewer, reducing its capacity at least one-third and taxing its resisting strength beyond the maximum. This dam was not shown on any of the blue prints or plans exhibited to the contractor and appears to have been unknown to any of the parties to the contract. It was, of course, beneath ground and unobservable and had doubtless been constructed by the defendants to do the very thing it did do, divert the sanitary sewage which should have passed through the 7-foot sewer into the 6-foot sewer. Governmental surroundings in close proximity to the mouth of the 7-foot sewer sustains an inference that the dam and the small drain pipes were designedly prepared to take care of the offense likely to be occasioned by the great amount of sewage certain to be deposited in Wallabout Basin. Both sewers were built of brick, and brick sewers are not designed to resist internal pressure. The plaintiff made no inquiries respecting the efficiency or inefficiency of the sewers or sewerage system, nor was he informed by anyone at the navy yard or in any wise connected with this contract about the same; he visited the site of the work and made an examination of the same; there was nothing from external appearances to warn him of this condition of overflow. Whether Admiral Endicott knew of this condition does not appear, as he was not called as a witness. Other bidders had been so informed. The defendants declined to care for the broken sewer or amend the contract in any way. They insisted upon its strict performance, and after a most voluminous correspondence, annulled the plaintiff's contract, took possession of his plant and materials, and subsequently turned them over to another contractor. The dry dock was finally constructed by the Holbrook, Cabot & Rollins Co.

32 Congress subsequently enlarged the appropriation very materially and a structure of larger proportions resulted. The 6-foot sewer which had caused all the controversy was finally cared for by plans and specifications proposed by the defendants; it was removed from the site of the work; its exposed ends made watertight by reinforced concrete bulkheads and sluice gates, and no water passed through it during the construction of the dry dock. After the completion of the dock it was rebuilt in the manner set forth in Finding XIII, from new plans and specifications, which resulted in a new sewer of entirely different materials and construction designed to overcome and forestall the recurrence of a disaster similar to the one of which plaintiff complained. This suit is to recover damages for the annulment of the contract, alleged in the petition as amounting to $250,767.73, two items being involved, a balance of $144,839.56 due on account of funds actually expended in the conduct of the work over and above all sums received therefor, and $105,928.17 profits.

The court is not in agreement, objection being made to both the conclusion and the findings of fact. Particular objection is made to the last paragraph of Finding X and all of Finding XIII. The task of deducing findings of fact from a voluminous and contradictory

cord is not only a difficult one, but an extremely important function this court. It is said that the last paragraph of Finding X states onclusion and not a fact. The distinction between an ultimate fact d a conclusion is frequently a very narrow one where the court is arged with the necessity of reporting the former and omitting the tter. The rules of the Supreme Court expressly exclude the apearance of any testimony in the findings and require the court to port the facts established by the evidence, in the nature of a special rdict. The finding objected to states a fact: it is true that it is the tement of a fact arrived at from the record. The testimony of tnesses introduced, the detail condition of affairs disclosed after break in the sewer, the amount of water in the excavation, and damages caused by the break were all considered in making up at we find to be a fact, an ultimate fact—*i. e.*, "it was unsafe to contractor's and the Government's property for the contractor to ceed with the sewer in its then condition." We might have recited detail the manifold results of the break and set forth with particuity the depth of the water projected into the excavation, the movent of the piles and sheeting installed to sustain the banks, and en the evidence in the record, but one fact insisted upon as estabhed by the record is the fact found in Finding X.

In the case of Ripley v. United States, 220 U. S., 491, and 222 U. S., , two orders of remand were entered by the Supreme Court direct- this court to find specifically upon the question of good or bad th—not bad faith in the sense of purposed wrongdoing, but bad th as a fact deducible from the record before us. It is extremely portant in this case to know as a fact whether the contractor could ve proceeded with his work with safety to his property and the vernment's property in his care and custody. Any verdict renred in this case ignoring this fact would fall of its own weight, and less the record in all its detail is to be reviewed it seems an indispensable proceeding to set forth as a fact that which the record convinces the court sitting as a jury is a fact. De Groot v. United States, 5 Wall., 519; United States v. Adams, 6 Wall., ; Mundy v. United States, 35 C. Cls., 265; Atlantic, Gulf & Pacific v. United States, No. 25293.

The Supreme Court of California in Levins v. Rovegno, 71 Cal., 3, concludes a discussion upon the question of ultimate facts with s very significant statement: "Where, in legal proceedings, from facts in evidence, the result can be reached by an exact process rational reasoning adopted in the investigation of proof, it becomes ultimate fact, to be found as such."

t is not by this finding intended to ascribe liability to any of the rties for the event which brought on this condition, nor does the rt undertake to say that plaintiff could not have repaired the er and proceeded with his contract. The paragraph is limited exsively to a fact which goes alone to the question of the right to se work after the break—the right to abandon the contract—and f paramount importance in this respect. That the finding is sup-

ported by the record seems quite beyond dispute; in fact it is so apparent that no officer of the Government thought of such a thing as a continuance of the contract work without the sewer being fully repaired or rebuilt. It would be utterly absurd to have done otherwise.

As to Finding XIII, it is asserted that the same deals with facts irrelevant and inadmissible because ex post facto in their relation to the issue involved. It is manifest that the finding is predicated wholly upon what occurred in reference to the construction of the dry dock after plaintiff's contract had been annulled by a different contractor under another contract. With a most singular inconsistency the defendants call the members of this contracting company as witnesses to prove by them that the plaintiff could not have possibly constructed the dry dock called for in his contract under the plans and specifications furnished him by the defendants in any other manner than the way employed by it in completing the dock. Every witness so called predicates his opinion from personal experiences gained in the execution of this contract of the Holbrook, Cabot & Rollins Co., and unhesitatingly ascribes a great money loss to the undertaking as assumed by the plaintiff in his contract. Yet when what the defendants did in taking care of the sewers and the detail of place and specification with reference to this most important feature of the whole undertaking is offered, it is insisted upon that the transaction is entirely disconnected with the former contract. The plaintiff's contract was annulled, his plant and property seized, and the reason assigned for the annulment was his unwillingness to proceed with the work. His unwillingness to proceed is ascribed wholly to the broken sewer and the circumstances causing its break. This constitutes the gist of the whole case. The right of annulment is not an arbitrary one; it can not be exercised capriciously, and courts have the right to investigate the exercise of the right. Surely it is of extreme importance to know what the defendants did with reference to the sewer, especially so when the work is being done with plaintiff's plant and constructed in part out of his material. Can it be that the defendants in one contract can seek refuge under an express right of forfeiture exercised because of certain con-
34 ditions, and then subsequently, in dealing with the identical subject matter under exactly similar conditions with property and materials in which the first contractor has an interest, repudiate and reverse the injurious course first pursued to the benefit and advantage of the later contractor? If it was right in the final instance to design a sewer impervious to internal pressure after the stoppage in the 7-foot sewer had been removed, is it not a matter of vital import to a court or jury to have before it some explanation for this inconsistent conduct in not a disconnected but a continuous dealing with the same subject matter mentioned in this plaintiff's contract, and which is the sole issue upon the point of liability in the case?

In Ceballos & Co. v. United States, 214 U. S., 47, the Supreme Court considered, although not set forth in the findings of this court,

what was done and what construction was given to an earlier contract of similar terms and subject matter to the one involved by the officers of the Government, and a substantial judgment was awarded the plaintiffs. In the Ceballos case the same inconsistencies appeared as here. Under one contract one course was pursued by the defendants; under another affecting similar interests in a like manner another method was adopted.

The first paragraph of the specifications expresses in plain terms that the intention of the defendants in making the contract is to secure the construction of a dry dock complete in all its parts. It is elementary that the intention of the parties to a contract and the work that is required thereunder is to be gathered from the instrument as a whole. The verbiage employed in one section can not standing alone determine this question if from an examination of the entire agreement the language of said paragraph contradicts other provisions. The contract in suit was intended to secure in the end the construction of a dry dock complete in all its parts, but it also included within its terms the construction of a new 6-foot sewer, not as an independent undertaking to be paid for separately, but out of the lump sum fixed by the terms of the contract for all the contractor was to do. The construction of the 6-foot sewer was just as much a part of the contract as any other work designed by its terms, and the obligations resting upon the contractor were just as great with reference thereto as they were to any other part of the work. The defendants made express provisions whereby the contractor assumed the task of removing all other obstructions from the site of the work. They might well have included the 6-foot sewer; not having done so, but expressly providing by exact and precise plans and specifications from which the contractor could not depart under peril of forfeiture and annulment of his contract, together with the withholding of his pay, it became incumbent upon defendants to provide for an adequate sewer. This proposition seems obvious. If the defendants had failed in the plans and specifications provided by them for the dry dock proper, and the contractor in following them could not have completed a work they were designed to accomplish, surely the responsibility for the failure would not rest upon him. The contractor is obligated to do what the plans and specifications direct him to do, and when he has done so in a good and workmanlike manner, he has discharged his responsibility under the contract. If the plans and specifications are deficient, if they are inadequate and structurally wrong, it is the fault of the parties proposing them and not the contractor executing the same. The judgment and skill of the contractor is relied upon by the defendants to the extent only of executing the plans as they design them. Neither the contractor's previous experience nor his general knowledge with reference to the character of the work is sought by the defendants in laying out the scope or detail of the same. He is expected to do the work in the manner and form prescribed by his employers, and if he fails, innumerable provisions of the very strictest character reserve ample pro-

tection for such failure to the defendants. In 6 Cyc., 63, the relationship between builder and architect employed by the building owner is most concisely stated as follows:

"Where the builder performs his work strictly in conformity with the plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications, and may recover under the contract; nor is he under any responsibility, in the event of the subsequent destruction of completed work, whether that destruction is caused by its own inherent weakness or from extraneous causes * * *."

In Bentley v. State, 73 Wis., 416, a case strikingly similar to this is exhaustively treated by the court. In that case the contractor engaged to construct two new wings to the State capitol building at Madison, Wis. The work was to be done in strict accord with plans and specifications prepared by an architect employed by a board of commissioners provided for in an act authorizing the contract. The contractor had partially completed his work; all that he had done had been inspected, accepted, and paid for, when suddenly the wall collapsed and fell. The commission thereafter employed additional architects, modified the plans and specifications, and the contractor finished in a satisfactory manner the work at the request of the State. It was shown that the plans and specifications were inefficient. The State declined to pay the contractor for the fallen wall. In giving the contractor a judgment for the full amount claimed, the court said: "Under the contract it is very manifest that, had the plaintiffs departed from such plans and specifications and refused to follow the directions of the architect, there could have been no recovery for the building of the south wing, even had they in the first instance built it as they were finally directed by the architect to do. On the contrary, they could only recover by furnishing materials and doing the work according to such plans, specifications, and directions as they allege they did. The fall was not the result of inevitable accident, as in several cases cited by counsel."

The case of J. Hampton Moore, Receiver, v. United States, 46 C. Cls., 139, is the nearest approach to an exact condition with the case at bar. In the Moore case a break occurred in a cofferdam constructed by the contractor under plans and specifications furnished him by the United States. In rendering judgment for the damages occasioned the contractor because of the break, the court said:

"Numerous cases to the same effect might be cited, and we believe the rule in cases of this character to be that where a contractor constructs a work under a contract which provides that it shall be done under the direction and supervision of an engineer appointed by and under the employ of the owner, and loss occurs to such contractor by reason of defects in the plans directed to be followed by such
36 engineer, of a character which ordinary skill would have foreseen, the owner should pay for such loss."

The defendants accepted a substantial judgment against them on this item of the claim, no appeal from the decision was taken, and the

judgment was paid. It is true that in the Moore case the contractor reconstructed the cofferdam and finished his work, contenting himself with suit after the conclusion of the contract. In this case, however, the situation was the opposite. The contractor interposed no objection to a mere repair of the sewer; that in itself was comparatively insignificant. What he asked for, and what was refused him, was an assurance that the defendants would assume responsibility for damages to a continuing menace, an apparent, open, and notorious danger to property of great money value, a loss which might ruin him. In the Moore case the contractor could well repair the cofferdam and proceed, for it was an indispensable adjunct to doing the subsequent work prescribed by the contract. In this case the menace remained a source of danger to all the contractor might subsequently do, notwithstanding the fact that he might repair or rebuild the same. The defendants in this case not only declined to suggest a method or purpose plans and specifications for averting the danger by reconstruction, but positively asserted a liability upon the contractor not only for all that had happened, but for all future loss as well.

In MacKnight Flintic Co. v. Mayor, 160 N. Y., 72, the court, in passing upon a suit to recover for work done according to plans and specifications furnished by the defendant, wherein a warranty appeared that the construction would produce certain water-tight floors, the court said: "The reasonable construction of the covenant under consideration is that the plaintiff should furnish the materials and do the work according to the plans and specifications, and thus make the floors water-tight, so far as the plans and specifications would permit." The case is apropos, and the opinion collects and cites with discriminating care all the authorities upon the subject.

This principle of law is fully affirmed in Horgan v. Mayor, etc., 160 N. Y., 516; McRitchie v. City of Lake View, 30 Ills. Appellate, 393; Filbert v. City of Philadelphia, 181 Pa. State, 530; 1 Parsons on Contracts, 587.

The defendants assail the applicability of the above citations and predicate their criticism upon a difference in the relative situation of the parties, it being insisted that all the cases cited were suits to simply recover for work and labor done and materials furnished in accord with the contracts and specifications, conceding in the argument that an action could be maintained by the contractor in this case for the full cost of building the 6-foot sewer even after the break. It will be impossible to cite a case on all fours with the one in suit, and no such citation is to be found in the briefs of counsel. The issue must be determined by resort to fundamental principles of law abstracted from judicial determinations wherein the facts come within the range of similarity. If the contractor can recover the contract price for constructing the sewer, he must do so on the theory that he has complied with his contract, and it is difficult to perceive a distinction in law which rewards the contractor for his contract work and at the same time holds him responsible for damages occa-

sioned by a defective design of the work he has admittedly performed in the only possible way he could do it and get pay therefor.

37 Again, it is insisted that the peculiar situation here removes this case from the rule above stated. The contractor not only assumed the risk to be anticipated from the location of the sewer but from breakage and disaster as well; that he was given ample warning by the terms of the contract to investigate conditions for himself, and having assumed an obligation to do the work he must perform it, no matter how difficult, expensive, or dangerous it may be to complete his contract. Defendants' contention would be forcible, if not unanswerable, if the disaster here complained of was the result of inevitable accident. The cause of the break in the 6-foot sewer is the pertinent inquiry in the first instance. The court concedes the contractor's obligation to do the work irrespective of difficulties encountered unless prevented from so doing by the act of God, the law, or the other party, and inevitable accident does not come within the exceptions. The findings disclose positively, and from them an irrefutable inference follows that the break in the sewer was not an inevitable accident; it was, in fact, not an accident at all in the legal signification of the term. The condition of the sewerage system of the navy yard was known to the defendants' officers to be seriously inefficient for years before the contract was let. Actual knowledge of this condition is brought directly home to Mr. Hollyday, the defendants' officer in charge of this work. The rain and the tide which caused the overflow were not unusual in the sense of a flood; it was to be expected and not out of the ordinary for that season of the year. There was no engineering difficulty in the way of caring for the volume of water which burst the 6-foot sewer and nothing in the surroundings which could possibly divert the attention of a prudent man with knowledge from anticipating the events which did happen. The 5-foot dam in the 7-foot sewer, a factor to which we might well ascribe the cause for the whole disaster, does not appear to have been known to any of the parties directly concerned with this contract. Who put it there must be left to inference also. It was not shown on any of the plans, specifications, or blue prints exhibited to the contractor, and was located entirely outside the territorial limits prescribed by the defendants for the contractor's work, and aside from connecting the 6-foot sewer with the 7-foot sewer the contractor had nothing to do therewith. The contractor himself visited the site of the dock and supplemented his personal visit by sending two of his representatives to do likewise. Neither the contractor nor his representatives was ever informed as to the inefficiency of the sewerage system, although the defendants knew of it. The defendants say that it was the duty of the contractor to see for himself whether he could perform the contract, and that in the exercise of common prudence he should have informed himself of all the particulars connected with the contract, and that where the means of knowledge is open and at hand and nothing is done to prevent him from using them, especially if he undertakes a personal examination, he can not

be heard to complain. It is said that the Government did not guarantee the integrity of the sewers. In support of these contentions, among other cases cited, reliance is had upon the case of Simpson v. United States, 172 U. S., 372. There is a plain distinction between the Simpson case and this one. In the former case the contractor obligated himself by the terms of the contract to do the work which resulted so injuriously because of quicksand beneath the surface of the soil to be excavated, i. e., the Government selected the site and on this site he agreed to construct a dock. Whatever difficulties he encountered in the way of natural conditions were, of course, to be anticipated. The Government did not guarantee the character of the soil, and made no provisions in the contract with respect thereto, simply designating the same as available. In the case at bar the defendants specifically undertook the responsibility for diverting and rebuilding the 6-foot sewer and prescribed in detail the exact way in which the contractor should proceed. This case is more like the case of Sickels v. United States, 1 C. Cls., 214. The contractor here was not allowed to suggest the plan; the difficulty in the way of proceeding was obvious; the situation was apparent and, as before observed, the defendants might have imposed the burden of obviating it upon the contractor, but they chose to assume it themselves.

38

Knowledge as a factor in fixing liability under contractual relations is not to be alone imputable to the contractor. The duty of both parties to the contract under a clause directing the contractor to visit the site and see for himself is mutual. The defendants can not withhold important information, or, mistakenly, state what they do know and acquit themselves of liability under this precautionary clause usual in all Government contracts. Hollerbach v. United States, 233 U. S., 165; Christie et al. v. United States, 237 U. S., 234.

The findings show that the defendants did know of the condition of the sewers, for they disclosed the same to some bidders and withheld it from the plaintiff. In Wilson v. Wall, 6 Wall., 83, the Supreme Court, in speaking of constructive notice sought to be imputed to a bona fide purchaser of lands for value, cited approvingly from Sugden on Vendors the following quotation:

"When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

What was there upon the site visible to inspection and open to investigation to charge the contractor with knowledge of an abnormal condition with respect to the sewers or suggest to him the pertinency of public inquiry in reference thereto? The site itself was more or

less covered by buildings which the contractor was to remove. Practically every description of interference beneath the surface of the earth was to be cared for by the contractor himself upon his responsibility except the building of the 6-foot sewer. The sewers were beneath the ground, there was absolutely nothing apparent, and nothing except an immediate occurrence of a rain similar to the one which did occur to even remotely suggest the subsequent disaster. All these interferences suggested, of course, difficulties in the skill and workmanship required to remove them and the cost thereof, but nothing as to the inherent structural weakness of a sewer the defendants would only allow him to remove and construct in a fixed and certain way.

39 What contractor would have gone among the native population making inquiry as to the internal capacity of sewers in the face of these express provisions in his contract, viz:

5. *Control of work.*—The United States, by its civil engineer in charge of the work or other authorized representative, shall at all times have full control and direction of the work under the contract, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such civil engineer or representative, subject only to appeal to the Chief of the Bureau of Yards and Docks.

* * * * * * *

159. *Back-fill for sewer.*—No back-filling shall be deposited upon the sewer until after the coat of cement mortar has been allowed twelve hours in which to set. In depositing back-fill in the sewer trench care shall be taken not to injure this coating in any way. No material shall be dumped from buckets or otherwise directly over the arch except as directed by the civil engineer in charge. Ashes and cinders, together with dry earth and loam from the line of the trench, may be used for back-filling. It is believed that such material may be obtained in the vicinity free of cost to the contractor, but the Government does not assume any responsibility in connection therewith.

* * * * * * *

SEWER.

196. *Sewer.*—The intercepting sewer in Dock Street, which now crosses the dock site, shall be diverted around the head of the dry dock, as shown on sheet 3. The new sewer shall have a uniform grade. Should either of the manholes now in the sewer be torn out in rebuilding it, they shall be rebuilt in the new sewer in a manner to correspond with the present manholes. All transverse sewers and drains that now empty into the present sewer on Dock Street and which are disturbed shall be rebuilt so as to empty into the new sewer, as directed. Those portions of streets torn up for constructing the sewer shall be refilled and rammed, as specified herein.

197. *Platform.*—The piles shall be capped transversely with 8 by 12 inch sound spruce timbers, secured to each pile by one $\frac{7}{8}$ by 20 inch galvanized-steel driftbolt. On these shall be laid 4 by 12 inch

spruce planking, close together, and fastened to each cross cap by two 9-inch wharf spikes to each plank.

198. *Curves.*—Whenever the sewer deviates from a straight line such deviations shall be true arcs of circles. The templets for the inverts shall be so arranged and the centers so constructed as to conform accurately to the given radii.

* * * * * * *

The court can not indulge a presumption, in the face of numerous decisions to the contrary, that the defendants in embarking on a great and expensive enterprise like the one here involved designed an important and integral part of the great work with careless disregard of the structural capacity of its plans and specifications, leaving to a contractor the ascertainment of latent defects by asking for information he has every reason to believe the defendants knew and considered. Is nothing to be taken for granted by the contractor from the terms of an agreement that designates in minute particulars what he shall do and how it shall be done? Are Government plans and specifications prepared by its efficient and experienced engineering corps to be treated as so generally precarious that they must be substantiated as to good or bad engineering by inquiries as to local atmospheric conditions and rainfall? Is gross carelessness and imprudence to be charged against a contractor in his dealings with the United States because he accepts without inquiry the engineering skill and ability of Government engineers? Who was in the best position to know of local conditions—the defendants or the plaintiff? There can be but one answer. Who was at fault in the premises? The defendants knew, as before observed, and while perhaps not intentionally withholding the knowledge, the effect is the same. The dam in the 7-foot sewer, like the sewer itself, was on Government property, with which the plaintiff had but temporary concern, and that was to attach the 6-foot sewer to the 7-foot one. It was placed there for the benefit of Government interests, viz, to preserve healthful conditions near Wallabout Basin. There was no way open for the plaintiff to detect its presence unless called upon to do absurd things. It was carelessly omitted from any record of the sewerage system, and its entire absence from the records of the general sewerage system of the city of Brooklyn sustains an inference that it could not have been the work of said city.

As Mr. Justice Day said in the Hollerbach case, supra, p. 172: "We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon

which the claimants had a right to rely without an investigation to prove its falsity."

No loss followed from the mere location of the sewer; it was properly constructed and supported; the record finds the loss ascribable wholly to inherent defects in engineering, inefficient plans and design, a fact fully corroborated by the subsequent conduct of the defendants in caring for this same sewer. Sundstrom v. State of New York, 213 N. Y., 68.

The defendants by their plans and specifications warranted their efficiency and the contractor had a right to rely upon them as correct representations of good and sufficient engineering skill and ability without an independent investigation of previous local conditions which might have warned him otherwise. He can not be held to have assumed the risk in any event for an obstruction in a sewer entirely outside the lines of his contract work, and which he had no means of discovering in the ordinary discharge of his contractual duty. The defendants were bound to furnish him workable plans to accomplish the desired end. They were likewise bound to furnish plans that allowed him to prosecute his work without loss, damage, or delay due to their mistake; and if by reason of their error the contractor could not proceed without the danger of not only loss of all his profits, but destruction of his and Government property as well,

41 he may, upon the defendants' absolute refusal to correct the same or refusal to assume responsibility therefor, abandon the contract and recover his loss.

It is conceded by the defendants that a breach of contract by them entitles the claimant to a judgment, and that if the bursting of the sewer and their subsequent conduct in reference thereto is found by the court to constitute a breach, liability attaches.

In Anvil Mining Co. v. Humble, 153 U. S., 540, Mr. Justice Brewer, speaking for the court, said:

"It is insisted, and authorities are cited in support thereof, that a party can not rescind a contract and at the same time recover damages for his nonperformance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the

work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."

We have set forth the above quotation in extenso not alone because it is a most just and salutary exposition of the law, but because of the applicability of the language to the case at bar. The bursting of the 6-foot sewer occurred on August 7, 1906; the claimant immediately gave notice and preferred his claim under the contract; a board was convened, its report going alone to the cost of repairing the sewer, and it was not until November 14, 1907, more than a year after the break, that the defendants decided to annul the contract. The claimant advocated persistently for a decision as to responsibility for damages; a mere repair of the sewer brought no relief; the menace remained if a brick sewer was to remain in close proximity to his work, upon which he had expended large sums of money and near which he had placed a costly plant. The defendants declined to submit plans and specifications structurally sufficient to care for the broken sewer; under the contract then the contractor could do no more than repair the old brick sewer; he was absolutely without authority to rebuild the bursted sewer in the manner the defendants subsequently constructed it, to the advantage and benefit of his successors. It is no answer to this contention to say that sunshine and drought might have succeeded the rain and tides and no further trouble occurred and the contractor finished his work. In fact, the contrary presumption obtains; rains did fall and storms come.

42 The damage has been done; a physical demonstration of the inefficiency of the defendants' plans and specifications was before the contractor; the defendants knew it as well as he, and yet in the face of a situation so obviously perilous, a condition that made the execution of the contract impossible without the loss of all profits, no attempt was made by the defendants to correct this error and thereby enable the contractor to proceed in safety. To say that the contractor might have gone on and finished his contract work is the assertion of a conjecture which the defendants themselves by their subsequent conduct negative and deny, for just as expeditiously as they possibly could at their own expense they made impossible a recurrence of the disaster by changing the design in both material and workmanship for the construction of this sewer, thus again demonstrating that it was not impossible engineering to care for this condition in the first instance. The old brick sewer was torn out, its exposed ends made water-tight, and the contractor furnished a safe place to perform his contract work. Hoe v. Sanborn, 21 N. Y., 552.

Surely this contract is not unilateral, imposing upon the contractor not alone the physical duty of skillfully putting together the material in the way specified by the defendants, but the greater responsibility of warranting that this way will produce the contemplated result without loss, let, or hindrance. The defendants can not escape all

responsibility for their part of the undertaking. No matter how precise the language of the scrivener, it has been universally held by the courts that the full measure of implied warranty attends the written undertaking and weighs with equality the reciprocal rights of the parties to the agreement, though it may not be found in the positive language of the written paper. A warranty does not have to be in every instance expressed in the contract, and the fact that methods are provided for changes in the contract, changes designed to produce with exactness the structural identity required by the plans and specifications, is a most potent argument in favor of the principle that the contractor is bound only to execute the plans of the defendants as he finds them, the defendants alone having the right to make the changes. The reason for the insertion of such a clause in the contract is a distinct recognition by the defendants that by their plans and specifications they impliedly warrant the structural sufficiency of the same and can not change, alter, or amend them unless the right to do so is reserved in the contract. The change, alteration, or amendment though made during the course of performance does not change the contractual rights of the parties except as to increased or decreased compensation. It does not affect the question of an implied warranty as to engineering sufficiency of the plans and specifications one way or the other. If liability attaches in the first instance it is equally potent under the changed condition.

We are unable to see any application of section 3744, Revised Statutes, to this case. The contract was in writing and met the requirement of the statute. The liability, if any exists, grows out of the written contract. It is just as much a part of the undertaking as any other feature of the work. It would be a rather novel proceeding to hold that the parties to this agreement, both claimant and defendant, could only be charged with such legal responsibility as the exact and limited language of the contract expressly states. Contractual relations bring certain legal responsibilities—some ascertainable
43 from the language used, others which the law implies from the relationship of the parties—and if the written instrument meets the requirements of a statute intended to prevent fraud, the contract is enforceable in law in all its legal aspects. We need not emphasize this assertion by a citation of authorities, for few, if any, contracts have ever been construed by the courts wherein the language used has been held to limit actions for their breach to a mere ascertainment of the meaning of the words. In this case there follows from the contract an implied obligation assumed by the contractor to do the contract work in a skillful and workmanlike manner; another that he assumes all risk for damages occasioned by any faulty construction due to his erroneous interpretation of the plans or unskillful workmanship. These obligations may or may not be expressed in the contract. The responsibility follows regardless of any express stipulation in the agreement, and the contractor could not escape it by a defense predicated upon section 3744, Revised Statutes.

The question of the sufficiency of the pleadings in this case was raised in this court by demurrer, and after mature deliberation the demurrer was overruled and the parties put upon their proof. This is not a case of attempted escape from difficulties attending the performance of a contract. These, of course, the contractor assumed and must abide his obligations. It is a case where the circumstances of the transaction disclose a condition ascribable to the defendants' conduct, a condition brought about by the defendants which did not create difficulties but rendered the performance of the contract impossible unless the contractor would willingly assume immeasurable responsibilities for damages, a risk and responsibility not imposed upon him by the contract or fairly deducible from its express terms.

A suggestion of a defense was predicated upon section 21 of the specifications, entitled "Contractor's responsibility." We do not believe it necessary to prolong the discussion of the case by adverting thereto. The clause has no application to a loss due entirely to the fault of the defendants. The wording of the stipulation limits its applicability to loss occasioned by some default of the contractor and is in no way involved in this case. The defendants do not emphasize the contention; in fact, concede, as before observed, liability in the event of a breach of the contract.

The damages recoverable follow the principles laid down in United States v. Behan, 110 U. S., 338. The record does not sustain a judgment for the entire sum of profits claimed in the petition. The court, sitting as a jury, from the whole record is convinced that the plaintiff under his contract could have completed the work and earned profits. Taking the testimony as a whole, we believe the contractor is entitled to $60,000 profits.

The ascertainment of the figures appearing in Finding XII upon which we predicate the amount of judgment herein was made comparatively simple by the report of a naval board appointed by the defendants, and bearing date May 29, 1907. This board, composed of competent engineers, made a detailed report covering the value of practically each and every item, including material on hand, in place, and all the tools and machinery necessarily employed upon the work. The court, in reconciling the adverse contentions respecting the amount involved, adopted this report as the best evidence of the facts stated therein; it emanates from an impartial tribunal com-
44 posed of men in every way qualified to speak upon the subject; it preceded the annulment of the contract; claimant was represented, and the board confined its efforts alone to the ascertainment of values irrespective of the contentions of the parties respecting their rights under the contract. Taking the amounts found by the board and comparing them with the sums testified to by the claimant's bookkeeper will forcibly demonstrate the accuracy of the results reached in Finding XII as to profits allowable. The claimant asserts that he actually expended in and about the performance of his contract up to date of annulment the sum of $274,597.88. In sum-

ming up this total many items of expense are included not properly chargeable to the defendants. Expenses incident to the attendance of witnesses and appearance of attorneys before the naval board are outside the legitimate zone of recovery for the breach of the contract. The total cost of the plant necessary to perform the contract work is also included, and no account whatever is taken of its necessary depreciation or salvage value had the claimant been permitted to complete the contract. A plant which the board found to be reasonably worth the sum of $124,551.63 at the time of the claimed breach, and which amount is already included in the judgment of the court, would beyond question, as the record discloses, be worth at the completion of the contract at least 40 or 50 per cent of its value, thus saving to the claimant upon his total outlay the sum of $62,275.81, or about one-fourth of the amount heretofore alleged to have been expended; and when this sum is deducted from the alleged total outlay it will confirm rather than dispute the accuracy of the court's finding respecting profits and approximately harmonize the result as to the conflicting claims.

The rule as to damages taken from the Behan case confines the judgment in that case to the reasonable expenditures made by claimant in the performance of the contract up to the time of the breach. In ascertaining this amount from a conflict in the testimony the court must look to the record as a whole, making its deductions in the form of a special verdict after deliberative consideration of all the testimony in the record. In the allowance of profits the court has followed the whole line of authorities cited with approval in the Behan case. The claimant goes for profits lost as well as for sums expended. As we understand the rule, the profits recoverable are to be determined by the difference between the cost of performance and the contract price, and this must be shown with sufficient certainty to remove the contention from the domain of speculation or remoteness. The defendants challenge the possibility of anticipated gains by testimony in the main from the officers and employees of the succeeding contractors. In this respect they are at an apparent disadvantage by reason of their conduct subsequent to the annulment of the contract. The contract work which the contractor here involved obligated himself to perform was never performed by him or any other contractor. The testimony offered, necessarily hypothetical, is rested upon a false basis. The cost of a proceeding involving an undertaking enlarged at least to more than twice the work required of the claimant and for which the defendants paid over two millions of dollars, is incomparable to the claimant's work under his contract. It affords no just criterion by which to judge the possibilities of gain which the claimant, an experienced contractor, undoubtedly contemplated in entering into his contract, which indeed was materially less in extent and comparatively insignificant in price when compared with the final work and gross expenditure. It is sedulously advanced, however, that claimant's own figures of expenditure, when viewed with reference to the amount of per-

formance accomplished at the time of the breach, absolutely preclude the possibility of gain. The record discloses, and the testimony concedes the fact, that the preliminary work preceding excavation and the work of excavating itself is the most expensive portion of the contractor's performance. This particular feature of dry-dock construction involves the greatest hazard and expense. It would be manifestly unjust to find that the claimant with respect to this work was not in a favorable situation. On the contrary, except for the sudden and unexpected break in the 6-foot sewer, the work was progressing under circumstances comparatively free from unusual obstacles and in a manner indicating its expeditious completion without unusual expense. In fixing the total amount of profits allowable we have given full consideration to the "circumstances and subject matter of the contract." Every item of expense viewed from every angle of competency has been deliberately charged to the contractor's cost of performance, in addition to the sums set forth in Finding XII, his relief from the cares and risks incident to full performance have been considered, and from the whole record, taking into account the testimony of the witnesses, favorable and unfavorable, the allowance is proven to the satisfaction of the court. The claimant was entitled under the law to complete his contract; he has proven he could have completed it at a gain well within what the record indisputably discloses as a fair and reasonable profit under all the circumstances of the undertaking.

Judgment is awarded the plaintiff under Finding XII for $141,180.86. It is so ordered.

Judges Barney and Atkinson concur.

Judge Downey not having heard this case took no part in the decision thereof.

Campbell, Chief Justice, dissenting:

As suggested in the majority opinion all of the members of the court did not agree upon the findings of fact. The discussion of some objections to the findings will appear without a detailed reference to them, but the last paragraph of Finding X was dissented from because it is manifestly a conclusion and its pertinency to the issues in this case is denied, notwithstanding the explanation in the opinion that "the paragraph is limited exclusively to a fact which goes alone to the question of the right to cease work after the break—the right to abandon the contract—and is of paramount importance in this respect." Whether the recovery, authorized by the court, rests upon "the right to abandon the contract" or the supposed warranty by the defendants of the plans and specification, must be determined from the opinion itself, but because I dissent from the reasoning and conclusions of the court as well as from some of the findings, it becomes necessary to state more at length my views of the entire case.

The material facts necessary to a full understanding of the questions involved are simple, and practically undisputed.

46 Advertisement having been made for proposals "for the construction by contract of a dry dock of the general dimen-

sions, and to be located at said navy yard at the place shown by the plans and specifications therein referred to," the plaintiff, as the successful bidder, entered into a contract to construct and complete said dry dock according to the plans and specification attached to the contract and with modifications as contemplated by paragraph 268. A copy of the contract is attached to the petition.

The site of the proposed dry dock having been selected at a place in the navy yard which had upon it buildings and structures, pipes and tracks, and, among other things, what is described in paragraph 196 of the specification as "the intercepting sewer in Dock Street which now crosses the dock site," the plans and specification provided for the removal of said structures and the diversion of the said sewer, which will hereafter be called the six-foot sewer, "around the head of the dry dock, as shown on sheet 3." The evident purpose in this removal of structures and diversion of the six-foot sewer was to clear the dry-dock site of impediments to the construction at said place of the dry dock. It will be noted here that paragraph 196, referring to the six-foot sewer, is under the general heading in the plans of "Temporary works and preparation of site." It was accordingly provided that the contractor should divert the sewer, and map 3 showed the location of the diverted section of it. There was no change to be made in its size or construction, brick being used in the latter as they were in the balance of the sewer. "The construction of the intercepting sewer and the removal of those structures to be torn down" were to be completed within six months from the date of the contract, and the entire work was required to be completed within 42 months from the date of the contract.

The said structures were removed, the 6-foot sewer was diverted in accordance with said map 3 within the stipulated time, and the sewer work was accepted and paid for by the defendants. The plaintiff then proceeded with the work of constructing the dry dock. On the 7th day of August, 1907, a year after the said diversion of the 6-foot sewer, "a sudden and heavy downpour of rain occurred, and coincident with it was a high tide, which forced water a considerable distance up the sewer to a depth of 2 feet or more," and the 6-foot sewer cracked in the part of it which had been diverted, and through the cracks water flowed into the dry-dock prism. Finding IX states that said break was caused by internal pressure of water from the sudden and heavy downpour of rain in conjunction with said existing high tide, which the sewer was not of sufficient size to carry away. This 7-foot sewer was intercepted by the 6-foot sewer a short distance from the dry-dock site, and both of them were parts of and main outlets to the Brooklyn sewer system. Some years prior to said contract a dam or obstruction, 5 feet high, had been placed in the 7-foot sewer, which diminished its capacity and increased the burden on the 6-foot sewer. The existence of said dam was not known to any of the parties concerned with said contract or plans nor to the superintendent of sewers of the city of Brooklyn. Said sewers had overflowed in the past "at sundry times, as the result of sudden and

heavy downpours of rain," and flooded portions of the navy yard and contiguous portions of said city. These conditions of overflow
47 were matters of common knowledge in the said neighborhood and were known to defendants' officer in charge, as well as to said superintendent of sewers.

Though bidders were admonished by the plans and specification, sections 271 and 274 above, to visit the site and inform themselves thoroughly of the actual conditions and requirements before submitting proposals, and that application should be made to the chief of bureau or the commandant at said navy yard for any further information needed by bidders, the plaintiff did not call upon either of said officers, but, as shown by Finding VII, he visited the site of the proposed work and made a superficial examination thereof. The finding also states that he sent one or two representatives to the civil engineer's office at the navy yard to obtain what information they could concerning the conditions and probable cost of the work. Whether these representatives actually called upon said officer or made any inquiries "concerning the conditions" is left to inference. There is no proof that they did so. It is entirely clear that the plaintiff personally did not see any of the said officers or seek information relative to the conditions, present or past, surrounding the sewers, because when questioned while he was testifying he not only answered "I believe I did make a superficial examination of the site. The site was pretty well covered with buildings and very little could have been determined by an examination of the site," but also that he knew there was a seven-foot sewer running down on the east side of the dock and a transverse six-foot sewer crossing it near the head of the dock, that he had no information as to their overflows, and that he did not make any inquiries to find out what were the capacity and results of these sewers, because, he says, "that would have been checking up the engineering of the work and I assume that the engineering of the work had been properly done." The plaintiff thus ignored the reasonable requirement of paragraph 274 of the plans to seek information before making his bid, as well as the provisions of paragraph 25, requiring the contractor to "check all plans furnished him." In view of these facts and of the language of Finding VI that plaintiff was not informed by the officer in charge that the sewers had overflowed and that some other bidders were so informed, it is manifest that the just inference from the facts is that some bidders got information which the plaintiff did not get, because they sought it and gave opportunity to the officer in charge to communicate it, while the plaintiff neither sought it nor gave such opportunity to the officer. "On the 7th day of August, 1906, a sudden and heavy downpour of rain occurred and coincident with it was a high tide, which forced water a considerable distance up the sewer to a depth of 2 feet or more; and during that period the sewers in the vicinity of the navy yard overflowed, and the said 6-foot sewer broke in the part constructed by the claimant, causing longitudinal cracks in three places in its top for a total length of 35 feet at a point op-

posite the head of the dry dock and about 50 feet therefrom, through which cracks water flowed into the excavation for the dry dock."

When the said break in the sewer occurred the plaintiff had been working on the dry-dock prism for a year without any interference from the sewer.

Immediately after said break the plaintiff addressed a communication to the officer in charge relative to the same, "stating
48 his purpose to suspend operations and not to resume until the Government had made provision for caring for or assuming the responsibility for the damage that had been or might be occasioned by the said sewer, its insufficient capacity, and location" (Finding X). This was on August 10, 1906, and the annullment of the contract did not occur until November, 1907, some 15 months later. In the meantime work under the contract was suspended. It appears that each party acted upon legal advice. On January 14, 1907, and again on January 25, the Secretary of the Navy addressed to plaintiff the communications mentioned in Finding X. In the first of these letters the Secretary, inclosing a copy of the opinion, said: "In view of the Attorney General's opinion the department holds you responsible for the completion of the work required by your contract, and it is accordingly requested that you proceed without further delay with the fulfillment of your operations in the premises. If you conclude, as your attorney said you probably would, not to proceed with the work, it is requested that you notify the department immediately to that effect." Under date of January 29, 1907, the plaintiff replied, and, besides stating his unwillingness to resume work, said: "You must recognize that the main point at issue is not as to who is responsible for what has occurred, but what is to be done for the future. Unquestionably a grave blunder has been made in the design of this sewer, and again in locating it where it is around the head of this dry-dock structure within the line of the natural slope of the excavation. Such conditions render it impossible for me to comply with your demand that I proceed with the work without modification of the sewer plan." The matter did not stop here, but thereafter a board of investigation was appointed, as stated in Finding X. This board convened on March 30 and "heard many witnesses, including those called by the contractor, who appeared before the board and was represented by counsel during its investigation. The board made its report, to which the contractor filed a number of exceptions" (Finding X). The board's report reviewed the whole matter relative to the sewer and a drainpipe complained of, and set forth their conclusions to which exceptions were filed by the plaintiff and considered. On June 13, 1907, the Secretary again requested plaintiff to resume operations under the contract without further delay. More correspondence ensued, and on November 14 the contract was annulled under the provisions of the contract. The plaintiff did not demand the repair of the sewer. He did not predicate his refusal to resume work upon "its then condition," but he demanded a change in its "design and location," an assumption by the Government of all re-

sponsibility for the damages that had been or might be "occasioned by the said sewer, its insufficient capacity, and location." In short, he demanded a new contract. At no time was the issue between the parties reduced to the question of which of them should repair the sewer. The real issue presented by the plaintiff was as has been stated, and while said Finding X may show it, the fact may be emphasized by the admission of plaintiff when testifying in his own interest before said board, "I believe to-day that the menace from that sewer is not from internal pressure; I believe that the sewer can be repaired or the internal pressure removed, and in either case that the sewer itself is all right, but I am convinced in my own mind
49 that the foundation has been damaged," as well as by the said statement in his letter of January 29. An estimate made at the instance of said board (Finding X) showed that to restore the sewer in as good condition as it was when completed and accepted would cost $3,875, and it is not conceivable that the expenditure of this or a greater sum would have deterred the plaintiff or the defendants if this had been the difference between them.

Considering the magnitude of his claims put in jeopardy, the profits he stood to lose and the damages he now claims to have suffered, the cause of his failure to resume work can not be found in the fact of the break or the alleged internal pressure of the sewer or the failure of the Government to repair it. He had made a contract to construct the dry dock for a stipulated sum, with the sewer as constructed in the position it was. True, he was to divert said section of it, and did so satisfactorily, but when he bid upon said work, and preliminary to his bid examined the plans and specification, he knew exactly where the diverted section of the sewer was to be located, its size, its construction of brick; that it was merely a segment of the sewer which drained a considerable area and was one of the outlets of the sewerage system of Brooklyn. As a bidder he must be presumed to have understood the plans (Clark v. Pope, 70 Ill., 128), and he could visualize, so to speak, the sewer in its new location. The case is not different from what it would be if the sewer had been diverted by some other contractor or had originally, before the contract was made, been located at that place. And so plain is this proposition that counsel for plaintiff argued and state on their brief in this court that the claimant assumed the risk of said location of said sewer. Such being the case, he manifestly can not complain of "the loss ascribable wholly to inherent defects in engineering, inefficient plans and designs." These, if they existed, should have been considered before he made his contract, and they afford him no cause of action based upon an abandonment of his contract. The plaintiff's cessation of all work under the contract and his refusal during 15 months thereafter to resume work can not be predicated upon the theory that defendants would not repair the broken sewer, but should be ascribed either to his realization that he had not protected himself, as he later thought he should have done, in his contract, or that his bid had been too low. The latter seems to me not improbable, because the consideration of

his contract was $757,800, which included the expense of diverting the sewer and removing buildings from the proposed site. He had consumed 18 months out of the 42 months stipulated as the time for completion, 1 year of this being used in excavation alone. The findings are silent as to the amount of work actually done when plaintiff suspended operations, but I think the record shows that he had not done one-fourth of the work required. The plaintiff's bookkeeper, testifying from his books of original entry, stated that there had been expended by plaintiff on account of the contract for said dry dock, exclusive of interest, the sum of $274,597.88. The plaintiff in his requests for findings asks the court to find the sum expended to be $274,597.88, exclusive of interest. The expenditure shows that with less than 25 per cent of the work done the plaintiff had expended nearly 35 per cent of his contract price. But when the work was relet under the same contract the lowest bidder's proposal was to complete the work for $764,000, "under practically the same conditions, in so far as sewers were concerned, as prevailed at the time of the cancellation of claimant's contract"; and in addition to said sum the new contractor was to have the use of plaintiff's plant and materials, amounting in value, as shown by Finding XII, to $97,308.73, allowing nothing for the item of sheet piling. If the new contractor had not the use of these materials and plant, his bid would have been correspondingly increased. As it was, the new contractor was, in effect, to receive the sum of said two items, making $861,308.73 to complete work upon which one year's time had been consumed and over $220,000 had been expended by plaintiff, with at least three-fourths of the work remaining to be done. On this basis the later contractor would originally have bid approximately one million dollars to do work which the plaintiff undertook to do for $757,800, or nearly one-quarter million less. The finding is silent as to whether any officer connected with or making said plans and specification or contract had any knowledge or information relative to said overflows. Any knowledge imputable to them because of the general notoriety in the vicinity of the navy yard as to the fact of overflows of the sewers would be equally chargeable by the same fact to plaintiff. And it may be here said that said overflows had occurred at rare intervals. So far as the record discloses none of them had occurred during the 18 months in which plaintiff was at work, and hence the statement of plaintiff's counsel on his brief: "Therefore it could not have been a matter of common knowledge that they had a habit of frequently overflowing, as it was not the fact." The findings show that none of the parties knew of the dam in the 7-foot sewer. The rule which charges the principal with the knowledge or notice his agent may have is not alike applicable to public and private agents. Hawkins v. United States, 96 U. S., 689, 691. Judge Lurton, in a case involving fraudulent representations by an agent, declared the rule to be that notice of facts to an agent is constructive notice to his principal only when it comes to the agent while concerned for the principal and in

the course of the very transaction, or so near before it that the agent must be presumed to recollect it. Alger v. Keith, 105 Fed., 105, 117.

Where, then, is there any basis for a recovery by plaintiff of damages, including profits, as upon a prevention by defendants of performance? He abandoned his work and refused to proceed. His right to abandon the contract needs a more substantial basis than the refusal of the defendants to accede to his demand. He examined and studied the plans and specification; he knew the location of the diverted section of the sewer; he had means of knowledge, which is often equivalent to knowledge itself, of the occasional overflows of said sewers. Information, if called for, could have been had from the officer in charge or from the city engineer or anyone living in the vicinity. He made a bid to do the work, and upon its acceptance entered into a contract to build and complete a dry dock. The majority opinion declares that "no loss followed the mere location of the sewer; it was properly constructed and supported; the record finds the loss ascribable wholly to inherent defects in engineering, inefficient plans and design, a fact wholly corroborated by the subsequent contract of the defendants in caring for this same sewer," and cites a number of cases, which will be considered later.

51 The question of location, construction, and support being thus removed, the opinion holds that "the defendants by their plans and specifications warranted their efficiency" and that "the contractor had a right to rely upon them as correct representations of good and sufficient engineering skill and ability without an independent investigation of previous local conditions which might have warned him otherwise." This view is open to serious question because of sections 271 and 274 of the specification requiring the plaintiff to investigate and seek information as well as because of the general rule of law affecting contractors. Clark v. Pope, 70 Ill., 128, 133; Simpson's case, 172 U. S., 372. The court holds that the defendants are liable in this case upon an implied warranty, the "inherent defects in engineering, inefficient plans and design" constituting the breach. These defects antedated the contract, and the general rule is that all prior negotiations and agreements are merged in the written contract. "We look in vain for any statement or agreement, or even intimation, that any warranty, express or implied, in favor of the contractor was entered into" (Simpson's case, 172 U. S., 380) in that case concerning the character of the underlying soil or in this case concerning the design or plans. "And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing." Seitz v. Brewers' Co., 141 U. S., 510, 517. An implied warranty can not be raised up where there is an express contract. Simpson's case, 172 U. S., 372, 379, where it is said: "Considering the facts above stated, it is at once apparent that the claim against the United States can only be allowed upon the theory that

it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation. The rule by which parties to a written contract are bound by its terms, and which holds that they can not be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders, by reference to the negotiations which preceded the making of the contract, or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement." See also Brawley v. United States, 96 U. S., 168, 173.

The rule thus announced is peculiarly applicable to certain Government contracts which by statute (sec. 3744, R. S.) are required to be in writing. That statute is mandatory in its requirements, and its policy excludes the idea that an implied warranty not within the implications of the language used in the express contract can be charged against the Government in the Navy Department's engagements. Sanger's case, 40 C. Cls., 47; South Boston Iron Co. case, 118 U. S., 37; St. Louis Hay & Grain Co. case, 191 U. S., 159; Monroe case, 184 U. S., 524.

In Sanger's case, 40 C. Cls., 47, 69, the court considered a contract in which some changes in the plans had been made prior to its execution, and considered also section 3744 Revised Statutes relative to the necessity for certain contracts to be in writing; and, speaking through Judge Peelle, said: "Hence the liability of the United States must be determined, not by the preliminary negotiations between the parties, but by the written contract into which the preliminary negotiations, including the change in the plans and the reduction of the quantity of stone, were merged," citing Simpson's case, supra; Brawley's case, 96 U. S., 168, 173, and other cases.

52

But what are the inherent defects in the plans or design? A properly located, constructed, and supported sewer is not bad engineering, and the bursting of a sewer under unusual conditions would not support the contention that it was defectively designed. The findings show that the sewer broke from internal pressure superinduced by a heavy downpour of rain and a rising tide. It hence follows that the warranty is made to extend to the strength or size of the sewer, the plans and design being regarded as faulty in that they did not "provide for an adequate sewer"—one large enough or strong enough to have resisted the forces which caused it to crack. But there was no such warranty stated in the contract; and if there was a duty resting upon the defendants to have planned otherwise than they did, it could not be enforced in an action ex contractu and, therefore, could not be enforceable in this court at all. If the 5-foot dam in the 7-foot sewer "be a factor to which we might well ascribe the cause for the whole disaster" and was unknown to any of the parties, its presence would not constitute a cause of action.

The cases cited by the court do not, it seems to me, sustain the conclusion reached in the court's opinion. They will be referred to in

their order: The Sickles case, 1 C. Cls., 214, is cited, and the rule of damages applied there has not been applied here. The assurance given in that case to the contractor that "the bottom of the knoll consisted of hard sand" when it developed to be soft mud, and the limited responsibility imposed by the terms of his contract, relieved the contractor in that case from performing an undertaking which both parties practically abandoned because it was found to be a "physical impossibility." He was allowed to receive the value of his materials assembled and used for the purposes of the undertaking, but no profits were allowed.

Bentley v. State, 73 Wis., 416, is said to be a case strikingly like this, but a radical difference exists between the two cases in that Bentley fully performed his contract and Spearin positively refused to perform at all. The one relied upon an executed contract; the other sues upon an executory contract. In the Bentley case the contractor, working under direction of the State's architect and conforming to the plans provided by the architect, built a wall which fell. Then, proceeding under a new architect and new plans, he replaced the fallen wall and completed the entire structure. He sued afterwards for the loss incident to the falling of the wall. The case went to the Supreme Court of Wisconsin upon the ruling on a demurrer to the complaint, and its allegations were, of course, taken as true. "According to the allegations of the complaint, it (the fall) was in consequence of insufficient and defective plans and specifications for a building of that magnitude." The plaintiff here built the diverted section of the sewer according to plans furnished him, and if, when the cracks appeared, he had repaired it and were here claiming the expense of the repairs, some similarity to the Bentley case might appear. True, the Bentley case seems to hold that the State guaranteed the plans, but that holding was not at all necessary to the conclusion reached, because under the averments of the com-
53 plaint, the contractor had to comply with the plans and the architect's directions as well, and as he did both it was declared by the court that "what was thus done or omitted to be done by the architect must be deemed to have been done or omitted by the State." It can not be affirmed that if when the wall fell Bentley had abandoned the work that court would have authorized a recovery upon his unexecuted contract, but it can be said that the views expressed as to the relative positions of the architect and plaintiff as "an ordinary mechanic" are not in harmony with other decisions, notably with Clark v. Pope, 70 Ill., 128, cited in the Bentley case, wherein the Illinois court says (p. 133): "The fact that he contracted to construct a building after certain plans, drawings, and specifications implies that he does understand them. The undertaking itself is upon the condition that he has that skill that will enable him to comprehend them, and the law will not permit him to escape liability on the ground he has exercised ordinary care and skill in that regard."

The other cases cited—MacKnight Flintic Stone Co. v. Mayor, 160 N. Y., 516; Horgan v. Mayor, Ib., 516; McRitchie v. City, 30 Ill.

App., 393; and Filbert v. City, 181 Pa. St., 530—are likewise inapplicable. The New York case is declared in the opinion therein to be "a similar case" to the Filbert case, 181 Pa. St., and in the latter it is made quite plain that the case turned upon the construction of the contract and its performance by Filbert. No question was raised or decided as to the city's guaranty or warranty of the efficacy of its plans, except the implied holding that the contractor did not warrant the plans furnished him, and if he conformed to them he was not liable for defects in the structure after its completion. It is one thing to say that a contractor does not guarantee the stability of work done according to the plans and specifications by which he must work, and an entirely different thing to say that the owner impliedly warrants such plans. The real question in each of said cases was whether the contractor had performed his contract according to the court's construction of it, and he was found to have done so. In none of them was a recovery predicated upon alleged defects in the plans. While there are expressions in the New York case relative to the guaranty of the efficiency of plans by the owner, they are evidently used arguendo, because in a later case, where the proposition was argued that the State "was the guarantor of its own plans" the court declined to so decide. Ginser Construction Co. v. State, 204 N. Y., 381, 396.

If the principle of guaranty or implied warranty of plans is applicable in any case, a court must hesitate to apply it in a case where the right of modification of the plans is reserved in the contract, as it is in the instant case. Kinser Cons. Co. v. State, 204 N. Y., 381; Kingsley v. City, 78 N. Y., 200, 211. Reliance is placed in the opinion on the case of Moore, Receiver, 46 C. Cls., 139.

In connection with the rule stated in the Moore case when it is sought to extend it beyond the question decided, the language of the Supreme Court in Atlantic, Gulf & Pacific Co. v. Philippine Islands, 219 U. S., 17, 23, should be noted:

"It is suggested that the reason for the Government undertaking was that the plan was made by the Government engineers. It may have been. But the plaintiff was content to work upon that plan; it, not the Government, was doing the work, and it took the risk
54 so far as the contract did not make a change. The Government could not be charged by it with negligence or with causing the first break. That was only something for repairing which the Government had promised to pay. Whatever the Government had not promised to pay for the contractor had to do in order to offer the completed work which it had agreed to furnish."

It would have been useless, apparently, to have enlarged the short diverted section unless all that portion of the sewer below such section and to its point of discharge hundreds of feet away was also enlarged. The defendants were dealing with a sewer that drained a large area of said city and formed a part of the city's sewer system, and it is to be presumed that the diversion of it was done under proper authority. No such conditions had previously presented themselves, but the

sewers had overflowed and remained intact. The warranty, then, is made to extend to the requirement that the diverted section would not break, because, if it does break, the contractor, upon the theory suggested, could abandon his contract and recover losses and profits as though prevented from completing his contract by the act of the defendants. It seems to me that such a conclusion goes back of the contract itself, considers what is termed inherent defects in engineering plans and designs, determines that the "defendants by their plans and specifications warranted their efficiency," and inferentially that they warranted that said sewer would not break. Plaintiff's action in such case must be founded upon a breach of this implied warranty and not upon the terms of the contract, which not only is silent as to any such warranty but excludes in the most comprehensive language any idea of the assumption of the responsibility here placed upon the defendants. That the supposed implied warranty—a collateral undertaking—can not be thus imported into the contract is clear. Seitz v. Brewing Co., 141 U. S., 510. To sustain the doctrine announced Anvil Mining Co. v. Humble, 153 U. S., 540, is cited which states the familiar rule that a party, engaging to do work, has a right to proceed free from any let or hindrance of the other party, and where such other party does prevent performance the first may treat the contract as broken. The facts showed a serious interference with and prevention of plaintiff's operations after the contract was made and the said rule was applied. The court did not go outside of the contract obligations, but enforced them. In the instant case the plaintiff committed a breach of the contract by suspending work and refusing to proceed, and a supposed dereliction of the engineers committed before the contract was made is put in the same category as the affirmative act of defendants preventing the performance of the contract was placed in the Humble case. Hoe v. Sanborn, 21 N. Y., 552, is also cited. It involved questions relating to sales of manufactured products and of warranties implied in sales. Certain rules applicable to sales and the right of purchasers are stated and need not be discussed because not applicable here. It may be suggested, however, that Hoe v. Sanborn points out that "implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract, principles which are strictly analogous to those upon which vendors are held liable for fraud. It is for the sake of convenience merely that this obligation is permitted to be enforced
55 under the form of contract." Such an action, as for a deceit, sounds in tort and is not within the jurisdiction of this court. Harley's case, 198 U. S., 229. The doctrine of Hoe v. Sanborn as to actions upon the warranty finds its application in matters of sales. It is not extended even to an exchange of chattels. Vail v. Strong, 10 Vt., 457. The views of the Supreme Court as to implied warranties in sales where there is a written contract are stated in Seitz v. Brewing Co., supra.

The cases cited do not sustain the conclusion that the defendants made an implied warranty. They are responsible, as other parties, for the reasonable implications of the language of their contract. Under the contract in question no warranty can be implied. Simpson's case, 172 U. S., 372; Seitz v. Brewing Co., 141 U. S., 510.

The objection to Finding XIII is not confined to its irrelevancy but to the application made of it as well. The record shows that after the annulment of plaintiff's contract and the reletting of it "under practically the same conditions in so far as sewers were concerned" to the Williams Co., that company proceeded with the work. This contract was annulled October 1, 1909, nearly two years after plaintiff's contract was annulled. The work was relet November 12, 1909, to Holbrook, Cabot & Rollins Co., whose bid on the basis of the dry dock as changed under the Williams contract was $1,389,000. The Holbrook Company surrounded the site with a cut-off wall of concrete sunk in pneumatic caissons and excavated inside of the wall. The plaintiff had steel sheet piles and the Williams Co. timber piles. It is agreed that the record does not show the impossibility of performance by plaintiff, "nor does the court undertake to say that the plaintiff could not have repaired the sewer and proceeded with his contract." But it is added that there was produced "a condition that made the execution of the contract impossible without the loss of all profits"; or "impossible unless the contractor would willingly assume immeasurable responsibilities for damages." There being no impossibility of performance, how does the question of expense tend to relieve the contractor? As has been shown, the objections made to the plans or design go to something that preceded the contract and about which the parties in terms did not stipulate. If it could be said to be allowable to consider these as a basis for recovery, it can not be said that what was done four or five years subsequently by the last contractor under his contract to build the sewer around the head of the dry dock when substantially completed can be resorted to as proof of how the original sewer when diverted should have been constructed, nor to prove that there were inherent defects of engineering in the first instance. It is not permissible to imply a warranty of plan and design made before the contract and support it by what transpired between other parties long after the contract and give damages including profits as upon a breach of the contract. The subsequent alteration of the sewer is not evidence that its original construction or location was faulty. Columbia, etc., Co. v. Hawthorn, 144 U. S., 202, 208; Clark case, 96 U. S., 37, 40. In the Ceballos case cited in the opinion the court looked to a former contract between the same parties and to their conduct in giving effect to their subsequent contract. How this can authorize a court in determining the rights of parties under this contract to look to another contract made subsequently with another party is not apparent.

56 It remains to be said that the plans and specification for the dry dock had no connection with the sewer, and their efficiency was untried by plaintiff. The sewer was not part of the dry-dock

design any more than the houses and structures which were also removed from the dry-dock site. It was diverted to clear the dock site, so that the plans and specification for the dry dock could be used. It is quite true that the contractor agreed to divert the sewer, as provided by paragraph 196 of the plans and specification, but his contract was to build and complete the dry dock, and the intercepting sewer mentioned in said paragraph is under the heading of "Temparary Works and Preparation of Site." He was given six months in which to remove the structures and divert the section of the sewer, and he covenanted to complete the dry dock within 36 months thereafter. If the theory be that the defendants should be made to respond in damages because of "inherent defects in engineering inefficient plans and designs" to which the loss is ascribed, when there is no stipulation in the contract upon that subject, we would overlook the long-established rules that the Government does not guarantee to any person the fidelity of any of its officers or agents whom it employs (Gibson's case, 8 Wall., 269), that it is not responsible, outside of its contracts, for the misfeasances or wrongs or negligencies or omissions of duty of its officers or agents (Bigby case, 188 U. S., 400, and cases there cited), and that parties entering into contracts with the United States are presumed to do so with a full knowledge of said principle and to consent to be dealt with accordingly. Hart's case, 95 U. S., 316. The record does not show that the sewer was the property of the United States, though furnishing an outlet and constituting a part of the Brooklyn sewer system it passed through Government property. If it was the property of the said city, as it must have been, since it served the city, and if it was allowed by the city to be or remain in a defective or dangerous condition, an action for damages caused thereby would be based upon negligence and sound in tort. Similarly, if it belonged to the defendant's, and they owed the duty of keeping it in a proper or safe condition, their liability for a breach of such duty in the absence of contractual obligations to do so would rest upon negligence and sound in tort. The material difference in the two illustrations is that the city could be made to respond for the tort, if liable, while the United States is not suable for torts. Bigby's case, 188 U. S., 400. In the Sundstrum case, 213 N. Y., 106, cited in the majority opinion, it is said that the liability of the State to its contractors for defects in its canal does not go so far as its liability to adjoining owners, and that "there is certainly no liability to contractors in the absence of negligence." Nor can a party by calling a wrongful act an implied warranty or guaranty convert it into a contract right. A claimant can not by the device of waiving the tort make a case of implied contract against the Government. Bigby's case, 188 U. S., 407, 409. There is accordingly excluded from the jurisdiction of the Court of Claims those claims or obligations which the law is said to imply from a tort. Harley's case, 198 U. S., 229. Juragua Iron Co. case, 212 U. S., 297, 309. Whether the case is rested upon the supposed inherent defects in engineering and design or a supposed duty on the Government to repair and maintain the sewer (and I do not agree that there

was any such defect or duty) the result must be that the action
57 can not be maintained, no matter by what name the supposed obligation be called. "A right of action in contract can not be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." Cooper v. Cooper, 147 Mass., 373, quoted approvingly in Bigby's case, supra.

If the action is on account of a failure to disclose the existence of said dam in the 7-foot sewer it would, under the foregoing cases, "sound in tort," and this court would not have jurisdiction.

The plaintiff sues upon an executory contract. He does not aver or show any impossibility of performance. There is nothing in the findings which shows that the defendants prevented performance or interposed any objection to his resumption of work. Their insistence was that he proceed. The findings show, inferentially at least, the great patience with which the plaintiff was dealt with and his continued refusal to resume. If under the circumstances after delaying for 15 months and the plaintiff's repeated refusals to resume work except upon conditions stated by him the defendants were not authorized to annul the contract, the provision in the contract giving that right must be ignored and treated as useless. It is, however, a valid provision. Graham's case, 231 U. S., 474.

The rule applicable to contracts generally is thus stated in Dermott v. Jones, 2 Wall., 1, which was twice before the Supreme Court and is a leading case on the subject: "It is a well-settled rule of law that if a party, by his contract, charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

In Dermott v. Jones, the contractor, Jones, contracted with Miss Dermott to build a certain house for her upon her land according to detailed plans and specifications prepared by her architect and made a part of the contract. He covenanted to supply all requisite material for the execution of the work in all its parts and details and for the complete finish and fitting for use and occupation of the building to be erected pursuant to the said plan of the work, and that the work should be executed and finished ready for occupation, and be delivered over "so finished and ready" at a date fixed. The contractor built the house according to the specifications. Owing to latent defect in the soil the foundation sank, the building became badly cracked, and so dangerous to passers-by that the owner, Miss Dermott, was compelled to take it down, renew the foundation, and rebuild that part of the structure which had given way. She did this at large expense, but made a good building. The contractor sued for the price of the original structure, and the owner sought to recoup the amount she had necessarily expended in order to render the cracked part of the house fit for use and occupation according to the plan and specification. The trial court refused to instruct the

jury that said expense was a proper matter of recoupment in said action, and that refusal made the important question in the appellate court.

In the Supreme Court's opinion it is said:

"The defendant in error [the contractor] insists that all the work he was required to do is set forth in the specifications, and that, having fulfilled his contract in a workmanlike manner he is not responsible for defects arising from a cause of which he was ignorant and which he has no agency in producing."

Referring to the signed instrument and the specifications, as forming the contract, it is said:

"In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him."

The court refers to a number of adjudicated cases and says:

"The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

It was accordingly held that the recoupment could be made.

It is declared in Smoot's case, 15 Wall., 36, that the impossibility which releases a man from his obligation to perform must be real, and not a mere inconvenience.

In The Harriman, 9 Wall., 161, 172, the rule is stated to be that if what is agreed to be done is possible and lawful it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. "It must be shown that the thing can not by any means be effected. Nothing short of this will excuse performance." See also R. R. v. Smith, 21 Wall., 255.

These principles were applied in Jacksonville Railway v. Hooper, 160 U. S., 514, 527, where the impossibility relied on arose subsequent to the making of the contract.

In Thorn v. Mayor, 1 L. R. App. Cases, 120, the declaration alleged that defendants guaranteed and warranted to the plaintiff that Blackfriars Bridge could be built according to certain plans and a specification then shown by defendants to plaintiffs, without tidework and in a manner comparatively inexpensive, and that certain caissons shown on the said plans would resist the pressure of water during the construction of the bridge, whereby the plaintiff was induced to contract with defendants for a certain sum of money, far less than he otherwise would have done, and then there was alleged the failure of the plans and specification and of the caissons, whereby he was obliged to expend large sums of money in an effort to build the bridge

according to such plans and in afterwards completing it. "The cause of the failure was that the caissons would not resist the external pressure of the water, so that the piers of the bridge had to be built independently of them and much of the preceding work was wasted, and the piers were built as the tide permitted the work to go on, which occasioned great delay." The Lord Chancellor stated the question to be "whether there is any, and if any, what, implied warranty on the part of the defendants to the effect stated in the declaration, or so as to give plaintiff a cause of action against defendants."

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Speaking of the consequences which would flow from a holding that the furnishing of plans and specification by the owner to a contractor implies a warranty, he says in his opinion: "The proposition which would be affirmed would not go merely to the present case, but would go to nearly every kind of work in which a contractor is employed, and in which, for convenience, specifications of the details of the work are issued by the person who desires to employ the contractor. In those specifications and in the contracts founded upon them an elasticity or latitude is always given by provisions for extra additional and expected work; but if it were to be held that there is with regard to the specification itself an implied warranty on the part of the person who invites tenders for the contract, that the work can be done in the way and under the conditions mentioned in the specification, so that he is to be liable in damages if it is found that it can not be so done, the consequences, I say, my Lords, would be most alarming. They would be consequences which would go to every person who, having employed an architect to prepare a plan for a house, afterwards enters into a contract to have the house built according to that plan. They would go to every case in which any work was invited to be done according to a specification, however unexpected might be the results from that work when it came actually to be executed." There was an express contract in the Thorn case, and it was not contended for plaintiff that there was any express warranty of the plan. The Lord Chancellor says the question may readily be asked, Is it natural to suppose that any warranty can have been intended or implied between these parties? He then proceeds with a supposed condition, which may be paraphrased and applied here as follows: Suppose the contractor had gone to the chief of the bureau or other officer and said, You want a dry dock built according to a certain plan and specification. Will the United States warrant that it can be built according to that plan with the diverted sewer where it is located on the plan? "Can any person for a moment entertain any reasonable doubt as to the answer he would have received?" It was held that no implied warranty was made and that damages as for a breach of warranty the plaintiff was in no respect entitled to.

In Bottoms v. Mayor of York, reported in Hudson on Bldg. Contrs., Vol. II, p. 220, it appeared there was a contract to build certain sewers under specifications, with the right reserved to the defendants' engineers to change the same. The plaintiff agreed that the works should be carried out in all respects with the specifications

and drawings and to the satisfaction of the engineer. The contractor commenced his work, and as he proceeded his difficulties increased, because of the condition of the soil. Having appealed to the engineer without avail, he appealed to the city authorities. He claimed the work could not be done according to said plans in that soil, and asked, as claimant here in substance asked, for a modification of his contract. The authorities refused it, as stated in the opinion of the Queen's Bench Division, from which court the appeal was prosecuted: "The corporation heard, through their committee, his application and refused to grant it," as was done in the instant case, "and they came to the resolution to give him notice under the terms of the contract to go on with the work. That notice was accordingly given. The plaintiff refused to go on with the work, and immediately afterwards,
60 on the expiration of the notice, the corporation seized the plant and took the work out of his hands." All these things were done in the instant case. Bottoms sued to recover for work he had done, and it was held that in the absence of any specific guaranty or definite representation as to the nature of the soil in which the works are to be executed a contractor is not entitled to abandon the contract on discovery of the nature of the soil, nor because the engineer declines to give written orders entitling him to extra payment in consequence of difficulties in executing the work which had not been foreseen by the contractor. It was further held that the corporation was within its rights, after the contractor's refusal to proceed, in seizing his plant, which they did as authorized by the contract. The conclusions there accord with the conclusions in Dermott v. Jones, supra.

These principles are applicable here. Plaintiff's undertaking was that he would build and complete the dry dock with the sewer located as it was and built of brick as it was. He suspended work and refused to proceed—he abandoned his contract and has shown no legal or valid excuse for his action.

There is nothing in the Hollerbach case, 233 U. S., 165, or the Christie case, decided lately, that contravenes the position taken in this dissenting opinion. In the former, effect was given to a positive statement in the specifications and in the latter to a failure to communicate, when applied to, the information in possession of the Government. Neither of them qualify the principle announced in the Simpson case, and neither holds that a contractor can fail to seek information, when notified he must do so, and then complain that he did not get information which more attentive bidders did get. Both cases admit "the rule that the contract is the law of the case." Simpson's case, supra; Atlantic Co. v. Philippine Islands, 219 U. S., 17, 23.

After plaintiff had notified the officer in charge that he would not resume work except upon conditions stated by him 15 months' time was consumed before the Secretary of the Navy exercised the right reserved in the contract of annulling it. Every reasonable effort was made to induce the plaintiff to proceed with his contract. Finding X shows this. But by his language and conduct he evinced a purpose

to stand by the determination formed on the day he notified the department of his intention to suspend and not resume. If, after all the correspondence, discussion, investigations, and report by a board of officers during said period of 15 months the Secretary did not have the right to annul the contract and relet it, it is difficult to see what course he could have pursued consistent with the contract. He rightfully annulled it. Graham case, 231 U. S., 474; Bottoms v. Mayor, supra; Roehm v. Horst, 178 U. S., 1.

If it can be said that the condition which arose was not one that was in contemplation of either party to the contract (Chicago, Milwaukee, etc., R. R. v. Hoyt, 149 U. S., 1, 15), the utmost that the plaintiff can claim is a right to quit work and remove his plant. He can not under such circumstances recover profits. I think, however, that the plaintiff should have judgment for the amount for which his plant was sold and some smaller items, aggregating $7,967.98.

61 *VII. Judgment of the court.*

At a Court of Claims held in the city of Washington on the 13th day of April, A. D. 1916, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the claimant, and do order, adjudge, and decree that the claimant, George B. Spearin, as aforesaid, do have and recover of and from the United States the sum of one hundred and forty-one thousand one hundred and eighty dollars and eighty-six cents ($141,180.86).

By the Court.

VIII. History of further proceedings.

On May 2, 1916, the claimant filed a motion to amend the opinion of the court and Finding XII, which motion was overruled by the court on May 22, 1916.

62 *IX. Defendants' application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 13th day of April, 1916, in favor of claimant, the defendants, by their attorney general, on the 10th day of June, 1916, make application for, and give notice of, an appeal to the Supreme Court of the United States.

Huston Thompson,
Assistant Attorney General.

Filed June 10, 1916.

Ordered that the above appeal be allowed as prayed for.

George E. Downey,
Presiding Judge.

Sept. 12, 1916.

63 *X. Claimant's application for, and allowance of, appeal.*

Now comes the claimant, and asks that an appeal be allowed from the judgment of the court, and from the order overruling his motion to amend the opinion of the court, and Finding XII, in order that claimant may recover his outlay and expenses less the value of materials on hand, whereas the court has found an estimated value, as stated by the naval board.

By his attorney:

FRANK W. HACKETT.

Filed June 12, 1916.

Ordered that the above appeal from the judgment of the court be allowed.

GEORGE E. DOWNEY,
Presiding Judge.

Sept. 12, 1916.

64 In the Court of Claims.

GEORGE B. SPEARIN
vs.
THE UNITED STATES. } No. 30509.

I, Samuel A. Putman, chief clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law, opinion and dissenting opinion of the court; of the judgment of the court; of the applications for, and allowance of, appeals of the defendants and claimant to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court at Washington City this 13th day of September, A. D. 1916.

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

(Indorsed:) File No. 25555. Court of Claims. Term No. 725. The United States, appellant, vs. George B. Spearin. File No. 25556. Term No. 726. George B. Spearin, appellant, vs. The United States. Filed October 17th, 1916. File Nos. 25555 & 25556.

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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, APPELLANT,
v.
GEORGE B. SPEARIN. } No. 44.

GEORGE B. SPEARIN, APPELLANT,
v.
THE UNITED STATES. } No. 45.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

STATEMENT.

The ground upon which appellee bases his claim for recovery in his petition is not followed in his brief. In the former he alleges a tort on the part of the United States in the following language (Rec. 7):

> Your petitioner further shows that under the conditions disclosed and developed in connection with the said sewer and drain pipe, wholly without fault or negligence on the part of your petitioner, and solely through the fault and negligence of the United States, it became and was impossible for your petitioner to proceed with safety in the performance of said contract * * *.

By section 159 of the Judicial Code a suitor in the Court of Claims is required to state in his petition under oath the basis for the claim which he seeks to recover from the Government. In his petition his claim sounds in tort, yet in his brief he departs entirely from this position and bottoms his action upon the theory that the Government impliedly warranted the sufficiency of the plans and design of the 6-foot sewer and in refusing to change the plans and design after the bursting of the sewer breached the contract.

Appellee says (brief 3, V):

> The sewer having been constructed by the claimant in strict accordance with the plans and specifications prepared by the defendants and having been approved, accepted, and paid for by the defendants, the action of the defendants requiring the claimant to repair the sewer after it had broken from internal pressure and to proceed with the construction of the dry dock without any change in the design of the sewer under penalty of forfeiture of his contract, amounted to a breach of the contract on the part of the defendants which entitled the claimant to stop work and sue for labor performed and materials furnished by him in carrying out the contract, together with prospective profits.

Being unable to recover upon a tort appellee shifted his ground to the position taken in the foregoing quotation from his brief. The entire brief skillfully puts forward the lack of knowledge of appellee of the conditions to be met in the area

where the dry dock was to be constructed as a reason for exempting him from performing his part of the contract and at the same time avoids the proper emphasis upon the ignorance of the Government of the dam in the 7-foot sewer. If appellee could not bring home to the Government knowledge of the existence of the dam in the 7-foot sewer then his charge (brief 16) that "there was a positive misrepresentation" on the part of the Government regarding the dam must fail and also the charge of a defective and improperly designed sewer, for the design of the sewer was as well known to him as it was to the Government at the time the contract was executed. The plans (sheet 7) showed that the sewer was to be built of brick, to have a diameter of 6 feet, and be laid upon piles.

It is maintained by the Government that the situation here was not due to a lack of design of the sewer. The old sewer had withstood the heavy downpours and floods from the sudden run-off in that district during many years the dam had been in the sewer. The cause of the break was the fact that on the seventh day of August "a sudden and heavy downpour of rain occurred and coincident with it was a high tide which forced water a considerable distance up the sewer to a depth of 2 feet or more." (R. 17, F. IX.) It is a fair presumption, judging from past history, that the sewer would have withstood this heavy downpour had it not been that the tide driving the water up the sewer held in check the oncoming flood until it mounted so high that some-

thing had to give way and the upper part of the sewer cracked. As the sewer had withstood all storms including those during the year after the segment had been replaced, it is reasonable to suppose that at the time of the signing of the contract neither the Government nor appellee had any idea that such a peculiar combination of circumstances would occur, and hence did not give thought to the idea of the sewer breaking.

The entire history of this case is one in which the Secretary of the Navy acted with great consideration and care. After the bursting of the dam and complaint by appellee the Secretary asked for an opinion from the Attorney General as to the rights of the respective parties under the contract. The Attorney General replied holding appellee responsible for the completion of the work. (R. 40.) To this opinion appellee objected. In fact, advised by counsel at each step (R. 40), he resisted and objected continuously.

Many of the matters set forth in appellee's brief are answered in a report referred to in the record (Finding X, p. 18) made by a board of investigation appointed by the Secretary of the Navy. This report is a public document, and will be quoted from, as was done with a report in the case of *Oliver B. Saalfield, etc.* v. *United States*, 246 U. S. 610–616.

It is proposed to reply to appellee's brief following as nearly as possible the order of argument therein set forth.

ARGUMENT.

I.

The plan for the construction of the dry dock was not defective. The plans for the dry dock and sewer were accepted by appellee.

Appellee's brief states that—

> The plan for the construction of the dry dock was defective, in that it provided for building at the head of, in close proximity to, and circling around, the excavation which was about to be made for the dry dock, a brick sewer which was of insufficient size to carry away the volume of water flowing into it at times of heavy rainfall, and was, therefore, subject to internal pressure (p. 4).

And:

> It was an error of design to place at the head of the excavation proposed to be made for the dry dock a sewer built of brick which was subject to internal pressure, because the moment such pressure was applied it was liable to burst at the sides and allow the water to flow from the openings thus made down into the excavation for the dry dock (p. 5).

Was the dry-dock plan defective because of conditions arising out of the functioning of a sewer which had been located there long before there was any idea of placing a dry-dock at that point? The dry dock and the sewer were two separate and distinct things. The construction of the former was the paramount work for which the contract was executed. The taking away and replacing of a segment

of the sewer at the head of the dry dock was a piece of temporary work, as evidenced by the language of the contract (p. 13, item 149), in which reference is made to the removal of the same under the heading of "Temporary works and preparation of site."

Throughout this entire case there has been no attack upon the design or plans of the dry dock. Appellee cleverly attempts to confuse the temporary work on the sewer with the paramount work on the dry dock. He says that it was an error of design to place such a sewer at the head of the excavation. The Government did not construct this sewer. It was a part of the main outlet "for the sewerage system of the city of Brooklyn," and certainly no one would suggest that the sewer was placed there with the idea of constructing a dry dock immediately next to it at some future time. When drafting the contract the Government, finding the sewer located at a place where the south end of the dry dock would cross it, wrote specifications calling for the removal of a small section to be replaced with a circular segment that would go around the head of the dry dock.

It is said that the sewer was built of brick and subject to internal pressure and therefore not of the proper design. How could appellee escape notice that it was a brick sewer (map 7) and avoid the consequences of having accepted that character of construction after signing the contract. It is generally known that a brick sewer is subject to internal pres-

sure and its resistance against internal pressure proportionate to the weight or pressure on the outside of the sewer.

For years the sewer was subjected to internal pressure, as demonstrated by overflowing "at sundry times as the result of sudden and heavy downpours of rain, causing the water to flow out from the manholes, catch basins, and other outlets." * * * "Said conditions of overflow were generally known to persons living in the vicinity of said area," to the Government employees, and to the civil engineer in charge of the Brooklyn sewer system. Therefore appellee had at least implied notice that the sewer was subject to frequent internal pressure. And yet he relies on his ignorance, saying he had "no knowledge of nor did he or his representatives make any inquiry concerning said sewers or the overflowing or capacity of or internal pressure in either of them." (Rec. 16, Finding VI.)

Appellee (brief 6) was apprehensive of the sewer bursting at the side and allowing the water to flow into the excavation. The apprehension was groundless for the sewer did not burst at the sides when the flood came. It cracked (Rec. 17, Finding IX) longitudinally on top. There is nothing said in the record about its breaking on the sides. Such an apprehension could not be capitalized by appellee into a cause for refusing to go on with the work, since the Government presented a plan for restoring the sewer "in as good condition as it was at the time it was completed" for $3,875 (Rec. 18, Finding X). On

March 30, 1907, more than seven months before the contract was annulled, the board reported to the Secretary of the Navy in part as follows:

> 19. The damage resulting from the failure of the sewer was: The cracking of the sewer itself, which is not of serious magnitude; the washing out of about 40 cubic yards of earth; the escape of an indeterminate quantity of water into the dry-dock excavation, but which was handled without any difficulty by the pumps, and did not appreciably raise the level of water in the dock; and the pushing of the sheet piles opposite the break into the excavation a maximum distance of 8.2 feet. These sheet piles had moved in about 1.3 feet prior to the break of the sewer, and if properly braced would not have moved at all. The actual damage resulting from the break in the six-foot sewer is therefore immaterial, especially in consideration of the magnitude of the whole work. * * *
>
> 21. From an engineering point of view the board recommends the carrying out of the following work as relieving the contractor for the dry dock from any further danger so far as the six-foot sewer is concerned: First, utilization of the present seven-foot sewer in Fifth street to the full limit of its capacity for the carrying off of storm flow through the carrying out of work on the general lines, but of a more temporary character than laid out on plan F. 576, S. 35 (Exhibit #5), submitted by the civil engineer of the yard with his letter of March, 1905. Second, the reinforcement of the portion of the six-foot sewer

rebuilt by the contractor so that it will be able to withstand internal pressure. A more detailed description of the work is given in a later part of this report.

22. The utilization of the full section of the seven-foot sewer for storm flow will increase the present combined capacity of the two large sewers by 50 per cent, and will thus remove a large part of the cause of the existence of internal pressure in the six-foot sewer during the heaviest storm; however, the calculations show that the two sewers both flowing full will not be able to carry off all the water without overflowing, and the creation of a condition of internal pressure. It is therefore deemed necessary for safety to reinforce the six-foot sewer. There should not be any difficulty with careful and intelligent conduct of the work to maintain the six-foot sewer during the dock construction as previously stated. But the board desires to call attention to the very desirable potential value of the seven-foot sewer as a temporary relief for the six-foot sewer, should this through any bad management or accident become temporarily disabled. By the use of the full section of the seven-foot sewer the amount of flooding of the navy-yard streets will incidentally be much reduced.

23. On account of the temporary nature of the work it is recommended that the work shown on plan F 576, S 35 (Exhibit #5) be modified as follows: First, shorten the curve connection between the seven-foot sewer in Fifth street and the six-foot sewer in Dock

street so that its radius will be about thirty feet instead of seventy feet; second, make the height of the contract dam shown in section "A A" two feet and three inches instead of three feet, and reduce its length to correspond to the thirty-foot radius of the new connection; third, omit the concrete from the seven-foot sewer indicated in section "F F;" fourth, construct the new outlet from the present end of the seven-foot sewer as a timber flume without piles, using heavy timber stringers to carry the railroad track.

24. In reinforcing the six-foot sewer to withstand internal pressure the board recommends the construction shown on Exhibit #34. As an alternative method the board proposes the placing of saddle shaped mass of concrete on the top of the sewer to resist by its weight the possible internal pressure, the block to be two feet thick over the middle of the sewer, 13 feet wide on top, and 6 feet deep at the sides.

The court has found that after the bursting of the sewer "it was unsafe to the contractor's and the Government's property for the contractor to proceed with the contract work with the 6-foot sewer in its then condition." Rec. p. 18, Finding X.

To this Chief Justice Campbell objects on the ground that it is a conclusion whose "pertinency to the issues in this case is denied." (Rec. 37.)

Obviously it is irrelevant and not pertinent in view of the fact that the damage to the sewer could have been easily remedied and the work on the dry dock

pushed ahead. Appellee could have removed the 7-foot dam, thereby increasing the carrying capacity of the two sewers 50%, and could have either sealed up the ends of the 6-foot sewer and used the 7-foot sewer together with the aid of sluice gates to take care of the run-off; or he could have put a saddle of cement on top of the sewer and thereby provided it with external pressure to resist the internal pressure. This he could have done immediately after the breakage. But he refused to move, and even when the board appointed by the Secretary of the Navy, on March 30, some seven months later, offered him a plan, he still refused and so continued until the contract was annulled. Instead of accepting the plan offered through the Secretary's report, as he was bound to do by the terms of the contract (secs. 17 and 21), he filed a long series of protests to the remedial suggestions in the report and continued to delay and protest. Having waited 15 months on appellee, the Secretary had no other alternative, if he ever hoped to complete the dry dock, than to relet the contract.

II.

Appellee was required to examine the site of the dock and sewer and inform himself thoroughly of the actual conditions, as far as they were known. The conditions were such that he was presumed to know them.

Under the second heading of his brief (p. 7) he sserts that—

> At the time he entered into the contract for the construction of the dry dock the claimant was not informed, nor had he any knowledge, of the insufficiency of the 6-foot sewer which he was required by his contract to divert and reconstruct around the head of the dry dock, nor was there anything in the conditions at the site of the work or in the circumstances connected with the making of the contract, to put him upon inquiry with reference thereto.

Appellee was about to invest $757,800 under the terms of a contract which placed upon him the responsibility of informing himself of the conditions surrounding the dry-dock location. This location included a part of the sewer in question. He was not a civil engineer. Under such circumstances, surely a reasonable man would be expected to make more than simply a "superficial examination"? (Rec. 16, Finding VII.) If this had been done and he had examined sheet 3 of the plans he would have discovered that the sewer from which he was to take a part and replace with a segment was of a certain height and thickness, made of brick, and

rested on piles and that from the manner in which it was laid on the pile foundation it could not have rolled off. He would also have recognized at once that this brick sewer was not designed to resist internal pressure. Having to deal with such a sewer, and being further warned (specification 35) that the soil was underlaid with quicksand, he would have sought to learn the ability of the sewer to function. It was generally known to persons living in that vicinity to overflow when there were rainstorms (Rec. 16, Finding VI) as evidenced by the overflowing of the manholes, catch basins, and outlets throughout the navy yard and the lower parts of the city of Brooklyn. A reasonable man would have applied to Mr. Holliday, the Government engineer in charge, or to the employees under him for information, and thereby learned the conditions. Other contractors who were bidding had learned from them. He could have procured information also from the city engineer of Brooklyn. In fact, he would have found it difficult to avoid the information if he had asked anyone living or working there. Yet, about to risk a fortune, he closed his eyes and ears to all these sources of information.

The report of the board appointed by the Secretary of the Navy contains the following:

> 16. Both the six-foot and the seven-foot sewers in the navy yard are main outlets from the Brooklyn sewerage system and drain well built up territory, so that a large proportion of storm water falling on the territory is

> quickly tributary. Due to the increase in the proportion of paved areas drained, and also due to the original designs by the city of Brooklyn not making ample provisions for tributary drainage, both sewers are heavily overtaxed during storms, causing water to overflow from manholes, catch basins, and other outlets, and to flood the navy yard, as well as the low portions of Brooklyn immediately adjoining. This condition has existed for years and has resulted in many successful damage suits against the city. After storms the overflow water flows back into the sewers, the low lands having acted as temporary storage reservoirs. The insufficient condition of the two sewers is much aggravated by the throttling of the seven-foot sewer in the navy yard, which reduces the combined capacity of the two sewers about one-third.

In his brief (p. 13) learned counsel takes exception to a statement in the Government's brief wherein it was said that the overflowing of the sewer was a matter of common knowledge. Appellee claims that the findings do not "make out a case of common knowledge." It is contended that because people living in the vicinity of the area knew about conditions "there could be no presumption that the claimant knew about it, unless he was shown to have lived in that vicinity."

And further, that it could

> * * * not be said that an overflow of a sewer used to drain a comparatively small area of the city of Brooklyn was a matter of com-

> mon knowledge so that all the world, including the claimant, is to be presumed to have had knowledge of that fact.

If the definition of the doctrine of common knowledge were as stated by appellee it would defeat the purpose which caused its adoption. Common knowledge is a thing which is defined or limited by the facts of each case. A citizen west of the Mississippi would not be presumed to know a situation existing in the area described in this case, but if that citizen were to come within the area to affect physical conditions therein about which there were facts generally known to the people in that community, he would be put upon notice and inquiry and hence presumed to know the conditions, one of which in the present case was the overflowing of the 6-foot sewer.

In the case of *The Phoenix Bridge Company* v. *United States*, 38 C. Cls. 492, affirmed in 211 U. S. 188, a corporation of the State of Pennsylvania, located in Philadelphia, contracted to supply certain masonry and to construct the superstructure for a bridge across the Mississippi River at Davenport, Iowa. The lower court said (p. 509):

> Without the fault of the defendant, plaintiff was, by an unforeseen event, rendered powerless to perform its contract within the time stipulated and it was met by the contingency of subjecting itself to the consequences of interrupting river navigation incident to its inability to perform, and the incurrence of such damages to the defendant and the public as might result from such interruption, or

> assume the burden of providing a temporary means of avoiding the obstruction of the river, and it chose the latter alternative. In any aspect of the case in which it may be presented, we are of the opinion that by the contract of the plaintiff it assumed the burden of this accident, if it may be thus characterized. It has been argued, to unburden itself of this liability, that the ice flow was the act of God, and thereby the contract was rendered impossible of performance. It can not be denied that the ice flow was the act of God, and by reason thereof the contract could not be performed, but counsel for plaintiff are mistaken in their application of the law in such cases, when it is claimed the bridge company was excused from performance because of the act of God, where the event which caused the impossibility of performance might have been anticipated and guarded against in the contract. The event of a frozen river and its incident of ice gorges *is of common observation in the locality of this contract, and might well have been anticipated by the parties.*

Here then was a corporation which did not have its place of residence "in that vicinity," yet it was presumed to know about a situation of common observation in the locality, and not having protected itself therefrom by a reservation in the contract could not recover.

Admitting, however, for the sake of the argument only, that appellee was not bound by facts generally known in that area, nevertheless some meaning must be given to section 271 of the speci-

fications requiring intending bidders "to examine the site of the proposed dry dock and inform themselves *thoroughly* of the actual conditions and requirements before submitting their proposals"; and section 274 requiring any further information needed by intending bidders," to be made to the Chief of the Bureau of Yards and Docks or to the commandant of the New York Navy Yard. [Italics ours.]

Is not the intention of these sections entirely deleted if they do not require one whose contract, specifications, and maps refer to the moving and reconstructing of a brick sewer, pipes, etc., upon a quicksand site, to at least inquire into the functioning of the sewer? Surely this is one of the "actual conditions" surrounding the sewer. And do they not also put him upon notice as to where he can get the "information needed"?

Criticism is aimed at the Government's statement (Appellee's brief, p. 14, 15) "that the dam in the 7-foot sewer was not shown on any of the city maps, nor was its presence actually known (Finding VI, Rec. 16) to any of the Government's officers or agents."

Appellee charges that "it may have been known to other Government officers or agents with whom those concerned with the making of the contract and plans were in communication," etc.

Before this war it was frequently stated that there were approximately 500,000 Government employees. How far is the Government chargeable with knowledge contained in the minds of any one of these 500,000 employees who might have been in com-

munication with those making the contract? The burden was on appellee to prove who the employee was, if any, and what knowledge he communicated. It is obvious that no such proof could be made.

The language of the finding is sufficiently inclusive to satisfy the most critical. It says, "agents concerned with said contract or the making of said plans." This includes not only those who surveyed the site, prepared the estimates, drafted the plans and maps, but also all those who may have done any drilling or had anything whatsoever to do with the contract up to the time of its execution. (*Christie, Lowe & Heyworth* v. *U. S.*, 237 U. S., 234.)

Attention is called by appellee (B. 16) to that part of section 6 of the specifications which provides that "the contractor will be allowed * * * a clear space at the side of the work included within the limits of the line shown on sheet 1," from which he argues that it is a fair inference that the contractor's investigations were to be confined within certain specified limits, these not including the entire length of the 6-foot sewer in the navy yard, and hence it was not permissible for him to have anything to do with the sewers just outside the limits shown on sheet 1. The quest for information respecting the overflow of the sewers and internal pressure would not have interfered with the requirements of section 6. Appellee seems to have overlooked that part of section 30 wherein it says:

> It is understood and agreed that the Government and the contractor will, so far as is

> possible, labor to mutual advantage where their several works in the above-mentioned or in unforeseen instances touch upon or interfere with each other.

Appellee (B. 16) declares that "with regard to the dam and the 7-foot sewer there was a positive misrepresentation." Misrepresentation must be predicated upon information other than and contrary to that given out. In other words, the Government must have had information that there was a dam in the 7-foot sewer; yet the findings say (p. 16, Finding VI):

> Nor was its presence actually known to any of the defendants' officers or agents concerned with said contract or the making of said plans until after the break in the sewer, etc.

In the case of *Christie, Lowe & Heyworth* v. *U. S.* (237 U. S., 234), it developed at the trial that the Government had information contrary to that which was shown upon the boring sheets and drawings, which it had gathered from borings made previous to the execution of the contract. Hence there was a misrepresentation. In the case at bar the Government did not know that there was a dam. Hence there could not be a misrepresentation of that fact. It might well be asked if it is the intention in this litigation to attempt to stretch the responsibility of the Government to cover matters about which it had no actual knowledge.

Owing to the limitations upon this brief the Government will not undertake to answer all the cases

referred to in appellee's brief. Those which appellee apparently deems most important will be differentiated from the case at bar.

In *Bentley et al* v. *State*, 73 Wisconsin, 416 (appellee's brief pp. 35 and 49), the facts are so divergent as to make impossible a parallel with the case at bar. In the first place, when the wing of the State capitol, which the contractor had completed, fell by reason of latent defects, he did not refuse to go on as in the instant case but completed the contract and sued for extras. The basis of his action was not a breach of contract on the part of the State, but one to recover for extra material and work and labor arising out of plans other than those formulated under the original contract. The pleadings alleged that the contractor proceeded without any knowledge of any defects or inefficiency, whereas in the instant case appellee was put upon his inquiry and had implied knowledge. Furthermore, appellee in the case at bar grounds his pleadings upon a different theory; i. e., failure to properly care for the sewers, "solely through the fault and negligence of the United States." (Rec., p. 7.)

In the Bentley case the wing of the capitol fell before it was finished. In the case at bar the arc of the sewer that replaced the part taken out had been finished, accepted, paid for, and constantly in use for about a year after its completion before the accident resulting from the storm of August 7, 1906.

The Bentley case is likened in principle to English decisions "to the effect that where goods or machinery are ordered for particular use, to the knowledge of the

manufacturer or vendor, there is an implied undertaking or warranty on his part that they will be fit for such use in the ordinary manner, and that in case of failure by reason of latent defects not discoverable by ordinary diligence upon inspection, such manufacturer or vendor is liable" (p. 436). There knowledge was required and presumed on the part of the manufacturer, whereas in the instant case the Government did not have knowledge of the dam in the sewer nor information leading it to the belief that the sewer would break. Again, the defects could not have been discovered by ordinary diligence in the English cases, whereas in the case at bar by ordinary inspection the question of internal pressure and overflow of the sewers could have been discovered by appellee.

In the case of *Kellogg Bridge Company* v. *Hamilton* (110 U. S., 108), appellee quotes (brief 37) from the opinion of Mr. Justice Harlan, which in part says:

> According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own (p. 116).

The Government maintains that this rule controlling buyer and seller is excluded from consideration in this case because the contract required appellee to make an investigation of the situation (spec. 271) and informed him as to where he could get needed information. (Spec. 274.) Furthermore, in the instant

case, it was not necessary for appellee to rely upon the Government, because he had time and opportunity in which to make his own inspection and investigation, and knowledge presumably equal with that of the Government. Moreover, by the terms of the contract responsibility to inform himself of the conditions to be met was placed upon appellee.

In the case of *Horgan* v. *Mayor*, 160 New York 516 (appellee's brief, p. 8), the question was not the right to rescind the contract because of the discovery of latent defects and hold the Government for anticipated profits, but (519) to recover for "extra work under the contract and for moneys alleged to be due him on account of improper measurements by the engineer of the material excavated." That was the only question, and it arose out of a situation where before the plaintiff was required to go ahead with his work the City of New York was "to draw off the water from the pond (p. 521)." Plaintiff did not refuse to go ahead, but completed his contract and then sued for extras and not for a breach on the part of the city.

There was a failure on the part of the city to do the thing it had specifically agreed to do, namely, to draw the water off the pond. The plaintiff drew the water off and therefore was entitled for the work so performed as upon an implied contract.

The instant case is not upon an undertaking, but for a wrong independent of contract. The appellee, realizing that no recovery can be had on that theory, by its brief attempts to shift to a supposed breach.

The case of *Sundstrom* v. *State of New York*, 213 N. Y. 68 (appellee's brief, p. 14), while containing language apropos of the situation in the instant case, bears no relation in fact, and its doctrine is therefore not germane.

A situation arose where a leakage from the old Champlain Canal seeped into a section of the Barge Canal, which Sundstrom and others were constructing. The claim was for additional expenses as for an alleged breach of contract on the part of the State, and not for a tort, clearly differentiating that case from the one at bar.

In the Sundstrom case the damage came from a source entirely outside of the section of the barge canal in question, whereas in the case at bar the damage was due to cracks in the arc of the sewer, which lay within the area defined by the contract, a situation which the contractor was bound to "thoroughly" examine. Sundstrom's case was sent back to the lower court for a new trial to determine the liability for leakage and overflow, and as a preliminary to that question whether *Sundstrom and his associates had knowledge either actual or implied of the leakage*. The court said (p. 74) that "if they had knowledge of the defect they should be held to have assumed the risk." The findings in the case at bar answer the following language from the Sundstrom case quoted with approval in appellee's brief (14):

> Of course, if the conditions were such that the leaks could have been observed and

> especially if seepage from all canals is *a matter of common knowledge*, the inference would be permissible even in the face of the claimant's denial that they were observed. That would be an inference of fact which we have no right to draw and which must be drawn if at all by the tribunal to which the power to pass upon the facts has been committed.

The answer is that such conditions "were generally known." (Finding VI.)

III.

The United States could not have been presumed to have known that the sewer would burst.

Under this head appellee admits (brief 24) that the "sewer was a city sewer and drained a considerable portion of the city of Brooklyn." He argues, however, that the United States must "be held to have known that it was liable to burst" (brief 23) from internal pressure, since the plans and specifications prepared by the Government called for a brick sewer which was not designed to resist internal pressure.

The history of this sewer is developed in the report of the board to the Secretary of the Navy heretofore referred to. Under paragraph 16 it is stated in substance that due to the increased proportion of paved areas drained, and also by the designs of the city of Brooklyn not making ample provisions for tributary drainage, the whole sewerage system was overtaxed during storms causing the water to flow from man-

holes, etc. This condition had existed for years. The finding (IX, p. 17) is that the sewer broke after a remarkable situation had arisen, namely, a sudden and heavy downpour coincident with the high tide which forced the water up the sewer to a depth of 2 or more feet. Not until then, so far as this record shows, had this sewerage system ever cracked. For years it had been overflowing at each heavy downpour. The situation, therefore, was not one which the Government could have been presumed to expect. Hence the assumption that the United States must be held to have had information that it was liable to burst is not borne out either by inference or by the findings. It is no argument to say that the Government should have known that it would burst because it was a brick sewer and therefore not designed to resist internal pressure. Undoubtedly it would have held during the storm of August 7, 1906, had there not been a high tide forcing the water up the sewer and holding it to meet the rushing torrent from the run-off of the streets, and piling it up so that something had to break.

It is said by appellee (brief 24) that the Government had absolute control over the sewer and power to make changes necessary to insure the safety of the dry-dock construction. The Government had the control, granted to it under the terms of the contract. By section 17 it could make changes where it deemed them necessary. It is charged that by Finding X (Rec. 17) the Government (appellee's brief, 25) "absolutely refused to make these changes for the

claimant." What changes? The finding says that appellee refused to go on "until the Government had made provision for caring for or assuming the responsibility for the damage that had been or might be occasioned by the said sewer, its insufficient capacity, and location," and that appellee demanded a change in the plans.

The damage, as has already been shown (Finding X, p. 17) by the report of the board, was very slight. Through the same report the Government had offered appellee a plan by which he could safeguard the work and go forward. It was not a question of restoring the sewer so that he could go ahead, that was uppermost in appellee's mind. As Chief Justice Campbell says (Rec. 40):

> The plaintiff did not demand the repair of the sewer. He did not predicate his refusal to resume work upon "its then condition," but he demanded a change in its "design and location," an assumption by the Government of all responsibility for the damages that had been or might be "occasioned by the said sewer, its insufficient capacity, and location." In short he demanded a new contract.

Chief Justice Campbell (Rec. 48) dissents from Finding XIII, in that it relates to matters occurring after the forfeiture of appellee's contract, and is therefore *ex post facto* as to the issues involved. Appellee says (Brief 25) that, "It is nevertheless admissible for the purpose of showing the control which the defendants were able to exercise and actually did exercise over this sewer," etc. An

examination of certain facts in the finding clearly demonstrates the impropriety of applying the matters *ex post facto* to the issues here involved.

It will be found that the length of the dock was increased from 554 feet, under the Spearin contract, to 723 feet under the Holbrook, Cabot and Robbins contract, and by reference to the plans it will be seen that this caused the south end of the dry dock to come within 60 to 70 feet nearer the buildings on the premises than was originally planned under the Spearin contract. In fact, the south end of the dry dock was approximately within 12 feet of a building.

Appellee admits (B. 45) that

> The dock as finally completed by the Holbrook, Cabot & Rollins Co. was entirely different in size, type, and method of construction from that which the claimant had agreed to build under his contract, and can not be used as a basis for an estimate of the cost of constructing the dock as it was to have been constructed under claimant's contract. In the matter of the foundation alone, claimant was to build a dock with a pile foundation capped with timbers and planks (specifications, pars. 33, 197), whereas the foundation of the Holbrook, Cabot & Rollins dry dock was to be of piers and anchors sunk in pneumatic caissons, thereby enormously increasing the cost over the method provided in claimant's contract. *In other respects also, there were such differences as to render it impossible to make any comparison between the two docks in estimating the cost of one as compared with the cost of the other.* [Italics ours.]

It is impossible to conceive of replacing under the very eaves of the buildings, and where there was so little soil, a brick sewer or any other than one constructed of reinforced concrete. A brick sewer would not be built on piers and without piles to support it where there was a quicksand foundation. Hence what was done under the Holbrook contract can be no criterion of what ought to have been done under the Spearin contract, in view of the complete change in size, character, and location of the drydock and the six-foot sewer.

IV.

The bursting of the sewer did not relieve appellee from the obligation to go on and finish the contract.

Appellee asserts under section 4 of his brief that he was not chargeable with the subsequent bursting of the sewer; that, having designed the sewer, the Government was liable, despite the fact that there was no warranty of design in the contract; and that therefore appellee had the right to cease work and bring an action for anticipated profits. So far appellee has failed to produce any case in support of this theory. The cases cited are those in which the question decided was not whether the Government or the party offering the plans warranted them in the absence of language to that effect in the contract, but were predicated upon the question as to whether the contractor had performed his contract according to the court's construction of it. In none of them was there a recovery based upon alleged insufficiency of plans.

There is a fundamental rule of law that disposes of appellee's case. It is that previous understandings are merged in the written word. The whole matter of the finality of contract is comprehended in the following statement from the case of *Seitz* v. *Brewing Company* (141 U. S., 510, 517), as follows:

> And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.

In the case at bar the conditions were reduced to writing which was silent as to a warranty. Hence the situation is controlled by the doctrine in Simpson's case (172 U. S., 372, 379).

Attention is called to the rule provided in Revised Statutes 3744, requiring Government contracts to be in writing. The purpose of this section is contrary to the contention that an implied warranty may be read into a written contract when made with the Navy Department.

V.

Appellee was required by the terms of the contract to ~~prepare~~ the sewer and to proceed with the construction of the dry dock.

It is asserted (appellee's brief 40) that "the defendants had no right to call upon claimant to make good the injuries which had been caused."

This statement is made in spite of that part of section 21 of the contract, which says that:

> The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of the Bureau of Yards and Docks, etc.
>
> * * * * *
>
> Provided, that the contractor shall specifically and distinctly assume all risks of damages or injuries from any cause to property or persons used or employed on or in connection with the work, and of all damages or injury to any person or property, wherever located, resulting from any action or operation under the contract or in connection with the work, etc.

And that part of section 27 which says:

> He shall protect his material and work from all deterioration and damage during construction, shall bear all the expense of maintenance of the work until acceptance, etc.

Reference is made by appellee to the case of *Gearty* v. *The Mayor* (171 N. Y., 61). The question there turned on the refusal of the city engineer to permit the contractor to go ahead with his work until the latter had torn up and relaid pavement which had already been constructed. In the case at bar the Government did not refuse to let appellee go ahead with the work after the sewer broke. On the contrary, the Chief of the Bureau (Rec. 17, Finding X) requested him to continue, and the Board appointed by the Secretary of the Navy (Rec. 18)

made its report showing him how he could remedy the situation and continue.

Furthermore, in the Gearty case the contractor completed the work and then brought suit.

In the case of *Anvil Mining Company* v. *Humble* (153 U. S., 540) (appellee's Brief 41), it was the Company which prevented Humble from continuing. The company (550) directed Humble and his associates to quit.

Again, it is claimed (brief 42) that "the defendants had no right to require the claimant to proceed with his work under the contract without making such changes in the design or location of the six-foot sewer as would enable him to proceed in safety." Appellee contends that mere repairs would not have made the construction of the dry dock safe, and that (brief 43) he was not at liberty to make any changes whatsoever "in the contract, plans, and specifications, the right to make any such changes being expressly reserved to the defendants." But the plan of repairs was duly prepared by the Board appointed by the Secretary in complete accord with the terms of the contract, and appellee still refused to continue the work. The Government is taken to task (appellee's brief 44) for arguing from the record that appellee in his refusal to go on with the work and complaining of the design was seeking a way out of a bad contract, and for saying that:

> Estimating on the basis of the bids of the contractor, who completed the project, the claimant should have "bid approximately

> $1,000,000 to do the work which the plaintiff undertook to do for $757,800."

For the sake of brevity the Government did not go into details in its brief of a matter which it thought was clear, but as a further elucidation the language of Chief Justice Campbell is here presented (Rec. 41):

> The latter [too low a bid] seems to me not improbable, because the consideration of his contract was $757,800, which included the expense of diverting the sewer and removing buildings from the proposed site. He had consumed 18 months out of the 42 months stipulated as the time for completion, 1 year of this being used in excavation alone. The findings are silent as to the amount of work actually done when plaintiff suspended operations, but I think the record shows that he had not done one-fourth of the work required. The plaintiff's bookkeeper, testifying from his books of original entry, stated that there had been expended by plaintiff on account of the contract for said dry dock, exclusive of interest, the sum of $274,597.88. The plaintiff in his requests for findings asks the court to find the sum expended to be $274,597.88, exclusive of interest. The expenditure shows that with less than 25 per cent of the work done the plaintiff had expended nearly 35 per cent of his contract price. But when the work was relet under the same contract the lowest bidder's proposal was to complete the work for $764,000, 'under practically the same conditions, in so far as sewers were concerned, as prevailed at the time of the cancellation of

claimant's contract;" and in addition to said sum the new contractor was to have the use of plaintiff's plant and materials, amounting in value, as shown by Finding XII, to $97,308.73, allowing nothing for the item of sheet piling. If the new contractor had not the use of these materials and plant, his bid would have been correspondingly increased As it was, the new contractor was, in effect, to receive the sum of said two items, making $861,308.73 to complete work upon which one year's time had been consumed and over $220,000 had been expended by plaintiff, with at least three-fourths of the work remaining to be done. On this basis the later contractor would originally have bid approximately one million dollars to do work which the plaintiff undertook to do for $757,800, or nearly one-quarter million less.

VI, VII, AND VIII.

The Government did not impliedly warrant the strength of the six-foot sewer. Appellee by refusing to proceed breached the contract and hence can not recover for anticipated profits nor the value of his plant above the amount admitted by the Government in its brief.

The matters discussed under headings VI and VII in appellee's brief have been so fully presented in the Government's original brief and in the opinion of Chief Justice Campbell that they will not be referred to here.

As to damages (appellee's brief, VIII, p. 58), since there is nothing in the finding suggesting an impossibility of performance on the part of appellee, and since it is conceded by the majority opinion (Rec. 23) that the court did not undertake "to say that plaintiff could not have repaired the sewer and proceeded with his contract", and (Rec. 27) that "the contractor interposed no objection to a mere repair of the sewer"; and since the Government did not prevent appellee from proceeding, the irresistible conclusion is that the latter breached the contract. In the face of a breach he should not recover $60,000 for anticipated profits. By the terms of the contract, if the Government did not breach the contract it was permitted to transfer the use of his plant to his successor and return to him what the plant would bring after the same was used. This, then, would defeat the various items claimed under Section VIII of appellee's brief and allow him the amount conceded by the Government, to wit, $7,907.98.

Hence the decision of the lower court should be reversed, the case remanded, and judgment rendered for appellee in said sum of $7,907.98.

Respectfully submitted,

HUSTON THOMPSON,
Assistant Attorney General.

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CITATIONS.

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
v.
GEORGE B. SPEARIN. } No. 288.

GEORGE B. SPEARIN, APPELLANT,
v.
THE UNITED STATES. } No. 289.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This appeal by the Government is from a judgment for plaintiff in the sum of $141,180.86. A dissenting opinion was rendered by Chief Justice Campbell. (51 C. Cls. 155.)

The suit grew out of a contract executed the 7th day of February, 1905, for the construction of a dry dock, at a point within the confines of the Brooklyn Navy Yard.

About 150 feet east of the site and running parallel to the axis of the dry dock was a 7-foot sewer. A 6-foot sewer crossed the south end of the site from the west side to the east side and intercepted the 7-foot sewer near the southeast side of the dry-dock location. The 7-foot sewer emptied into Wallabout

Basin, through four 24-inch pipes, at a point near the mouth of the dry dock. The 6-foot sewer emptied into the East River. Both were of brick construction, not designed to resist internal pressure, and were main outlets for the sewerage system of the city of Brooklyn. Some time previous to this contract a dam 5 to 5½ feet high had been built in the 7-foot sewer just below the point of intersection with the 6-foot sewer. This diverted the water into the 6-foot sewer until it rose high enough in the 7-foot sewer to pass over said dam. The four 24-inch pipes and the said dam reduced the combined capacity of the 6 and 7 foot sewers. The contract provided, as shown upon the plans annexed thereto, that the 6-foot sewer should be diverted upon an arc of a circle around the head of the dock and that it should be constructed in a manner identical with the old 6-foot sewer, both as to its size and material. The location of the diverted section of the sewer placed it at a distance varying from 37 to 50 feet from the excavation for the dry dock. (Findings II, III, IV, V, Rec. 14, 15.)

Prior to the date of the contract and for some time thereafter the existence of the dam in the 7-foot sewer was not known to the city's civil engineer, it was not shown on any city maps, nor was its presence actually known to any of the Government's officers or agents connected with the contract.

Appellee had no knowledge at the time of signing the contract and made no inquiries concerning the sewers or their capacity or the internal pressure of

either of them. He was not informed by the officer in charge that the sewers had overflowed in the past, although other bidders were. (Finding VI, Rec. 16.) Plaintiff made a superficial examination of the premises before submitting his proposal and sent one or two representatives to the engineer's office at the navy yard to obtain information concerning condition and probable cost. (Finding VII, Rec. 16.) Immediately after the signing of the contract the 6-foot intercepting sewer was commenced by the contractor and completed according to the plans and specifications. This sewer was approved, accepted, and paid for by the Government, and remained in constant use without accident for about a year after completion. On the 7th day of August, following a heavy downpour of rain and a high tide which forced the water up the sewer to a depth of 2 feet or more, the 6-foot sewer broke in the reconstructed part owing to internal pressure and flooded the excavation for the dry dock. (Findings VIII, IX, Rec. 16.) Plaintiff immediately suspended operations and refused to go on until the Government assumed responsibility for the damage that had been or might be occasioned by the said sewer. On February 7, 1907, a board of investigation which had been appointed by the Secretary of the Navy found that the sewer could be restored to good condition for $[illegible]75. After a great deal of correspondence and continuous refusal on the part of the plaintiff to continue construction, the contract was declared null and void on November 14, 1907, by the Secretary of the Navy, in ac-

cordance with clauses 15 and 16 of the specifications. On the following day the Government took possession of appellee's plant and materials and of the dock site. (Findings X, XI, Rec. 17, 18.)

At this time plaintiff had expended on the plant, materials, and work $210,939.18, and had received from the Government $129,758.32. (Finding XII, Rec. 18.)

Subsequently the contract was relet to the Williams Engineering and Contracting Company, and later, under a supplemental agreement, the construction and size of the dock and the contract price were very much increased. This contract was canceled and the work was completed by Holbrook, Cabot & Rollins Company, the contract being again changed in respect to the size of the dry dock and amount involved. The 6-foot sewer was reconstructed by the last named firm according to plans and specifications prepared by defendant, being in size 5 feet by 6 feet, rectangular in shape, and made of reinforced concrete. (Finding XIII, Rec. 19.) The plant left by plaintiff was used by the Holbrook, Cabot & Rollins Company, who returned to the possession of the Navy Department from time to time the items of plant, tools, appliances, etc., which were no longer required. After notice had been given to plaintiff to remove the plant and upon his failure so to do, it was sold at public auction for $4,407.98. This amount was credited to the fund of "Miscellaneous receipts, proceeds of sale." The Government does not defend against this amount, together with other items of the plant amounting to

$3,500, making a total of $7,907.98. (Finding XIV, Rec. 20.)

The Government maintains that the provisions of

ASSIGNMENTS OF ERROR.

The Court of Claims erred in finding—

(1) That appellee was entitled to judgment of and from the United States in the sum of $141,180.86. (Finding XII, Rec. 20.)

(2) That appellee was entitled to the sum of $60,000 as anticipated profits. (Finding XII, Rec. 19.)

(3) That appellee was entitled to the sum of $81,180.86, in addition to the said sum of $60,000, over and above all amounts received by him on account from the United States. (Finding XII, Rec. 19, 20.)

(4) That appellee was entitled to any other sum than $7,907.98.

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tract, was liable for damages for cost of plant, materials, moneys expended, and anticipated profits.

BRIEF OF ARGUMENT.

I.

Plaintiff was bound to complete the dry dock, and his refusal so to do breached the contract.

II.

A warranty guaranteeing the strength of the sewer can not be read into an express contract, and in its absence appellee breached the contract by refusing to continue work.

III.

Having breached the contract appellee could only recover for the value of the plant after the dry dock was completed.

ARGUMENT.

First.

Plaintiff was bound to complete the dry dock, and his refusal so to do breached the contract.

Appellee removed and rebuilt that part of the 6-foot sewer around the south side of the dock and continued to excavate for a year until the 7th day of August, 1906, on which day the combination of a heavy rain storm and high tide caused internal pressure making longitudinal cracks in the sewer. Through these water flowed into the excavation. Immediately thereafter appellee refused to go on with the work, insisting (Finding X, Rec. 17) that the Government assume responsibility for damage that had been or might be occasioned. After much correspondence and persistent refusal to continue on the part of appellee, the Government annulled the

contract on the 14th day of November, 1907, thirteen months after the sewer broke. According to a board appointed by the Secretary of the Navy (Finding X, Rec. 17), the estimated cost of restoring the sewer was $3,875.

To synchronize the entire situation reference must also be made to the specifications.[1] They were submitted to intending bidders, who were warned that they were expected "to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals" (par. 271); that the contractors would be held responsible for the entire work and every part of it until completion and final acceptance of the dry dock, and should assume all risks of damages or injury from any cause to property or persons used on or employed in connection with the work, and all damage or injury to property wherever located resulting "from any action or operation under the contract or in connection with the work" (par. 21); that contractors would be responsible for whatever might occur under the conditions which existed at and around the site of the dry dock, and that pneumatic pipes, salt water and fresh water pipes and the electric subway along the line of the new sewer should be protected from injury by the contractor during the progress of the work, and that he would be "held responsible for and required to repair all damages to same that may result by reason of building

[1] Provisions of the contract pertinent to the issues in this case will be found in the appendix to this brief.

of the new sewer * * *" (sec. 149); that the specifications (pars. 196 and 198), together with plans (sheets 3 and 7), informed the bidder of the manner of construction of the new section of the 6-foot sewer, its location, its probable effect upon the convenience and economy of doing the work and its ultimate stability; that the contractor (par. 274) was to call upon the Bureau of Yards and Docks or the commandant of the navy yard for any further information and it would be furnished; that the plans accompanying the specifications showed the location of both the 6 and 7 foot sewer.

In addition to the foregoing, it was a matter of common knowledge (Finding VI, Rec. 16) that heavy downpours in former years repeatedly caused the water to flow out from the manholes, catch basins, and other outlets of each of said sewers, flooding the lower portions of the navy yard and contiguous parts of the city of Brooklyn.

While appellee had no knowledge and made no inquiry concerning the overflow of the sewers or the internal pressure, he could have learned this as other bidders did who made inquiries about the same. The dam in the 7-foot sewer was not shown on any of the city maps, nor was its presence actually known (Finding VI, Rec. 16) to any of the Government's officers or agents until after the break, the sewer being under ground and the dam invisible, nor is it known who placed the dam in the sewer. Appellee, who was not a civil engineer, personally visited the site (Finding VII, Rec. 16) and made a superficial

examination thereof, and sent one or two representatives to the civil engineer's office at the navy yard to obtain what information they could concerning the conditions and probable cost of the work. He agreed under the terms of the contract to construct the dry dock and the sewer (specifications, par. 196) according to the Government's plans. Hence, there is no escape for him from his obligations. He did not seek information where he could have gotten it. The construction of the dry dock was not impossible, for subsequent performance negatives the idea. The fact that there was additional expense does not relieve him, nor place the responsibility upon the Government. The scope of the undertaking was fixed by the contract and appellee thereby took the "risk of the obstacles to that extent." (*Carnegie Steel Company* v. *United States*, 240 U. S. 156, 164; *Globe Refining Company* v. *Landa Cotton Oil Company*, 190 U. S. 540, 543, 544; *Maryland Dredging and Contracting Company* v. *United States*, 241 U. S. 184; *Dermott* v. *Jones*, 2 Wall. 1, 7.)

The location of the sewer is so closely related to the danger which it is claimed arose on account of the internal pressure that they can not be dissociated. If the sewer had been located on Morris Avenue, the street a block south of the head of the dock, the cracks in it and the water therefrom would have constituted little or no menace to the work of constructing the dry-dock. It would seem to follow that the location was primarily responsible not for the breaking of the sewer, but for the consequences

which resulted therefrom. The sewer might have cracked in any other location from the same cause, and yet the consequences would have been entirely different.

Appellee contends that the cracking and escape of water was not one of the risks which he could anticipate because of the location; that what he was responsible for was the giving way of the foundation or overturning of the sewer as a result of its close proximity to the head of the dock, and this, he says, did not happen. But it is no answer to say that he did not contemplate or think of this particular kind of accident. Certainly the cracking of a sewer from internal pressure was not an unheard-of thing. Anyone familiar with the conditions in the city of Brooklyn at that time would have known that these two particular sewers which emptied through the navy yard were subject to internal pressure; that they overflowed through the manholes, which inevitably implied internal pressure. Appellee, in assuming the risk incident to location, also assumed that quality or element of risk arising from internal pressure, as well as from overturning or failure of the foundation of the sewer.

Suppose the accident which interrupted the work had been caused by the sewer overturning, falling from its foundation, or sliding so as to break, it would have been just as much of an answer for him to say that he had not thought of this danger or considered it when he was preparing his bid or at the time he

entered into the contract as to say now that he did not think of the danger of the sewer cracking from internal pressure. Perhaps no human foresight could have foreseen all the possible dangers that might have occurred from building the sewer in that location.

If it was of insufficient size, the fault was not that of the United States. This was an old sewer; it had been built many years before by the city of Brooklyn, the United States paying a portion of the cost of construction within the confines of the navy yard. The United States had nothing to do with designing it, determining its size or capacity, or the amount of territory which it should drain.

If the sewer was of insufficient size, it would not have helped matters had the new section which appellee built around the head of the dock been increased in size. "A chain is no stronger than its weakest link," so a sewer is no stronger than its weakest part. It would have increased the danger to have had a section of the sewer, say, 10 feet in diameter and the balance of it 6. Like a drum on a stovepipe it would have filled up and burst on all sides.

There was a long stretch of this 6-foot sewer passing through the navy yard, and for a considerable distance it was within the "site" selected for this dry dock. The new section of the sewer built around the head of the dock was required to be identical in size and form with the old part of the sewer. The character of construction was to be the same. Appellee knew

this when he entered into the contract. He knew that the replaced section would be the *same size, capacity, and strength as the sewer in place at the time.* If there was any weakness in either respect in the old sewer, it would be in the new, and conversely, there would be no weakness in the new sewer that was not in the old. The whole matter, therefore, is as if the new section had not been built. He is in precisely the same situation with respect to the 6-foot sewer as he was with respect to the 7. Suppose the 7-foot sewer cracked from internal pressure, permitting the water to run into the excavation, could appellee have said that the United States must assume all responsibility for the damage which might result from the breaking of the sewer? Certainly not.

If appellee had made any inquiry whatever on the subject either from the civil engineer, the commandant, or other employees of the navy yard about the history of these sewers, he would undoubtedly have learned the fact of overflow during storms. It was a matter of common knowledge. Numerous suits had been brought against the city of Brooklyn in the magistrate courts by owners of property and business men on account of alleged damage done from overflow of these sewers in sections of the city contiguous to the navy yard. It can not be said, of course, that appellee had *actual* knowledge of these suits, but these conditions were so open and notorious that appellee ought to have known them and he would have obtained actual knowledge of them if he had been a prudent and careful bidder.

There was no concealment on the part of the United States of the fact that the sewers had overflowed. There is a marked distinction between active concealment and innocent nondisclosure. (Page on Contracts, par. 90.)

The majority opinion states (R. 29) that the "findings show that the defendant did know of the condition of the sewers, for they disclosed the same to some bidders and withheld it from the plaintiff." Upon what authority can it be said that they withheld information from appellee? The findings say that the conditions were a matter of common knowledge (R. 6). Appellee was therefore presumed to know, to be upon his guard, and the burden was upon him to inform himself as other bidders did who made inquiries and as a prudent man would have done. It not being incumbent upon the Government to bring to appellee's attention matters of common knowledge, there could not have been any deception unless the same were contained within the terms of the contract and specifications. Therein this case differs from the case of *Hollerbach* v. *United States* (233 U. S. 165). There specification 33 stated that "The dam is now backed with about 50 feet of stone, sawdust, and sediment to a height of within two or three feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust and other material." It was found that the statement was not true and instead that "7 feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet

of sound log filled with stone." This made the work more expensive than the contractor expected, he having relied upon the statement in the specifications respecting "The matter concerning which the Government might be presumed to speak with knowledge and authority." The misrepresentation was of a vital matter presumed to be within the knowledge of the Government and not within the knowledge of the contractor. In the present case there was no misrepresentation in the contract or specifications and the facts were presumed to be within the knowledge of appellee.

Nor is this case parallel to *Christie et al.* v. *United States* (237 U. S. 234) relied upon by the majority opinion. There the Government stated that "the material to be excavated, as far as known, is shown by borings, drawings of which may be seen at this office." It developed at the trial that the Government had other information showing material more difficult to excavate than that appearing on those drawings. "Claimants were forced to rely upon the information furnished them, time not being sufficient to permit them to make their own borings." The court held that this was "deceptive representation of material and it misled."

Of course, it is not contended in the majority opinion that the Government had any knowledge of the dam in the 7-foot sewer. It is said (Rec. 22) this dam was not shown on any of the blue prints or plans exhibited to contractor and appears to have been unknown to any of the parties to the contract. It is

added that "It was, of course, beneath the ground and unobservable and had doubtless been constructed by defendant to do the very thing it did do. * * *" There is nothing in the findings to support the statement that it "had doubtless been constructed by the defendant to do the very thing it did do." On the contrary it is admitted (Rec. 28) by the majority opinion that "who put it there must be left to inference also."

Finally, the whole matter is summed up in the proposition that appellee having bound himself by a contract to do a thing which was not impossible was therefore required to perform his part or suffer the consequences.

SECOND.

A warranty guaranteeing the strength of the sewer can not be read into an express contract, and in its absence appellee breached the contract by refusing to continue work.

There was no express warranty in the contract, specifications, or findings that either the old or new part of the 6-foot sewer would not break, nor was there any guarantee of protection to appellee in the happening of such event. The majority opinion states that "no loss followed from the mere location of the sewer; it was properly constructed and supported; the findings ascribe the loss wholly to *inherent defects in engineering, inefficient plans, and design*, a fact fully corroborated by the subsequent conduct of the defendants in caring for this same sewer." (Rec. 32.) This eliminates location, con-

struction, and support, and confines the question to "inherent defects in engineering" and "inefficient plans and designs." The opinion asserts, despite the silence of the contract, specifications, and findings that "the defendant by the plans and specifications warranted" the efficiency of the plans and design of the sewer.

To the contrary are the authorities. In Hudson on Contracts it is said (Vol. I, 4th ed., p. 64):

> Neither the employer nor the architect impliedly warrants to the contractor that the works can be executed according to the plans and specification; and the contractor apart from express warranty, has no remedy against the architect or the employer if the plans and specifications turn out unworkable.
>
> "The builder, before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification."
>
> *Per* Lord Chelmsford, *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120; L. R. 9 Ex. 163; 10 Ex. 112, and see cases there cited.

Simpson v. *United States* (172 U. S. 372) is like this case in principle, and, paraphrasing its language, it could be declared in the case at bar that, *if the claimant intended to undertake to build the dock for the price stipulated, provided a guarantee was afforded him by the United States that the sewers*

lying in proximity to the site of the dock were of sufficient size and strength to perform their regular functions without injury to or interference with the work to be done under the contract, a purpose so important, so vital, would necessarily have found direct and positive expression in the bid or contract.

Appellee's contention is foreclosed by his failure to have had an express warranty inserted in the contract.

As said by Mr. Justice Swayne in *Dermott* v. *Jones* (*supra*, p. 7):

> It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.

See *Day* v. *United States* (245 U. S. 159).

There was no inherent impossibility of performance by reason of the sewers and there was no act of the United States, nor any act of God, making it impossible to complete the construction of the dry dock.

Appellee seems purposely to have avoided any consideration of the small amount it would have cost to repair the sewer so that the work could go ahead. As a matter of fact he did not want to go ahead. He had taken the contract at too low a figure. He saw that he was losing money. He evidently thought that the cracking of the sewer gave him an opportunity to escape from

the performance of his contract. Chief Justice Campbell in his dissenting opinion states the situation when he says (Rec. 41): "The latter seems to me not improbable, because the consideration of his contract was $757,800, which included the expense of diverting the sewer and removing buildings from the proposed site * * *. * * * there had been expended by the plaintiff on account of the contract for said dry dock, exclusive of the interest, the sum of $274,597.88 * * * the expenditure shows that with less than 25 per cent of the work done the plaintiff had expended nearly 35 per cent of his contract price." He said further, in substance, that estimating on the basis of the bids of the contractor who completed the project, appellee should have "bid approximately one million dollars to do the work which the plaintiff undertook to do for $757,800.00."

What was there to have prevented appellee from proceeding to reinforce the sewer so as to make it safe and continuing with the work? This could have been done for about $3,875. (R. 18, Finding X.) The figures may be taken as a basis of what it would have cost to proceed with the work, yet appellee with this small item in the balance refused for fifteen months to resume work on a $757,800 contract.

It is practically admitted by the majority opinion (R. 23) that the sewer could have been repaired and the work continued where it says:

> It is not by this finding intended to ascribe liability to any of the parties for the event

> which brought on this condition, nor does the court undertake to say that plaintiff *could not have repaired the sewer and proceeded with the contract.*
>
> *Railroad Co.* v. *Smith* (21 Wall., 255, 263).

With every opportunity to complete the work, the refusal of the appellee to proceed must be construed as an attempt to escape from a losing contract.

THIRD.

Having broken the contract, appellee could only recover for the value of the plant after the dry dock was completed.

On the theory that the Government, by the plans and specifications, guaranteed appellee against loss for inherent defects in engineering, inefficient plans and designs, the findings (XII) allow appellee $141,180.86, of which (R. 35) $60,000 was for anticipated profits, the remainder being for the amount alleged to have been expended over and above payments received. If the Government's position be correct, that appellee was bound to complete the contract, then he breached it by his refusal to go on with the construction. By his breach the Government, under the terms of the contract, was empowered to declare it annulled (spec. 15), and in such event had the right to the use of appellee's plant until the work was finished. The subsequent contractor, who completed the dry dock, used this plant, and upon appellee's refusal to take it over it was sold, and the amount resulting therefrom, together with other

small items aggregating a total of $7,907.98, is the amount of the judgment which the Government and Chief Justice Campbell think appellee should recover. Because of appellee's breach, the item of $60,000 for anticipated profits should be stricken out.

An additional reason for not allowing this item is that it is easily deducible from the findings that there could not have been any profits in this contract on the basis of appellee's bid.

Finally, the Government should not respond in damages over and above the amount admitted by it, even upon the theory that it is liable for "inherent defects in engineering, inefficient plans and designs," there being no stipulation imposing a contractual obligation upon the Government. The Government is not responsible outside of the terms of its contracts for the neglect or failure on the part of its officers or agents to perform their duty, and those entering into contracts with the Government are presumed to know this.

Suppose the sewers belonged to the Government, and it was its duty to keep them in a proper and safe condition, and the Government failed to do so, then in the absence of a contractual obligation the liability would be one sounding in tort upon which the United States is not suable. (*Bigbee* v. *U. S.*, 188 U. S. 400; *Juragua Iron Company*, 212 U. S. 297, 309.)

That the Government intended to treat appellee fairly, even generously, is shown by the fact that no claim has been made for liquidated damages under

section 12 of the specifications. Appellee succeeded in persuading the Court of Claims to incorporate in Finding XIII certain facts to which appellant objected. Appellant's objections to this finding have been well stated by Chief Justice Campbell in his dissenting opinion on page 48 of the record, and the same may be said of his statement (Rec. 37) criticizing the last paragraph of Finding X.

The Secretary of the Navy with great patience and fairness examined the complaints and objections of appellee, after which he submitted the matter to the Attorney General, who construed the contract as requiring the appellee to complete the work. Still later the controversy was submitted to a board for its finding, and the Secretary again requested appellee to proceed with the work (Finding XIII). His refusal compelled the Secretary to cancel the contract.

Wherefore, it is respectfully submitted that the decision of the lower court should be reversed and the case remanded with an order to enter judgment for appellee in the sum of $7,907.98.

HUSTON THOMPSON,
Assistant Attorney General.

APPENDIX.

Provisions of the Contract Which are Pertinent to the Issues in This Case.

1. *Intention.*—It is the declared and acknowledged intention and meaning to provide and secure a complete and substantial dry dock in perfect working order, together with approaches, crane track, conduits, capstans, bollards, pump well, and all other needful appurtenances for the operation of the same, except the caisson for closing the entrance and the pumping plant, which are not included in this specification. All shall be as shown, indicated, or called for by the accompanying plans, and this specification, except as provided for in paragraph 3, and to the entire satisfaction of the Chief of the Bureau of Yards and Docks.

2. *Contract.*—The contract to cover the work to be done will be based upon this specification and the plans to which it refers, which will be attached to and form a part thereof.

5. *Control of work.*—The United States, by its civil engineer in charge of the work or other authorized representative, shall at all times have full control and direction of the work under the contract, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such civil engineer or representative, subject only to appeal to the Chief of the Bureau of Yards and Docks.

9. *Time of completion.*—Within six months from the date of the contract the construction of the intercepting sewer and the removal of those structures to be torn down shall be completed. The entire work covered by the contract shall be completed in every respect and particular within forty-two calendar months from the date of the contract.

12. *Damages for delay.*—In case the work is not completed within the time specified in paragraph 9, or the time allowed by the Chief of the Bureau of Yards and Docks, under paragraph 10 of this specification, it is distinctly understood and agreed that deductions at the rate of $100 per day shall be made from the contract price as liquidated

damages and not as penalty, for each and every calendar day after and exclusive of the date within which completion was required, up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon in advance as the measure of damage to the United States by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract.

13. *Unavoidable delays.*—Unavoidable delays are such as result from causes which are undoubtedly, or may reasonably be presumed to be, beyond the control of the contractor, such as acts of Providence, damage caused by destructive storms, fires (not the result of negligence), fortuitous events, inevitable accidents, etc. Delays caused by acts of the United States will also be regarded as unavoidable delays. Should the progress of the work be, or seem likely to be, delayed at any time by such causes the contractor shall at once notify the civil engineer in charge, in writing, of the occurrence, in order that a record of the same may be made. Should it be decided that the delay was unavoidable, a corresponding extension of time for the completion of the work may be allowed, but it is distinctly understood that should the contractor fail or neglect to notify the civil engineer in charge, as above provided, such omission shall be construed as a waiver of all claim and right to an extension of time for the completion of the work on account of such delay.

15. *Progress of work.*—If at any time the progress of the work shall, in the opinion of the civil engineer in charge, appear to have been such as to indicate that the work is not likely to be completed within the time allowed, he shall report such opinion to the Chief of the Bureau of Yards and Docks, who may, in his discretion, declare the contract null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof.

17. *Changes.*—The United States reserves the right to make such changes in the contract, plans, and specification as may be deemed necessary or advisable by the Chief of the Bureau of Yards and Docks. Should any such

changes affect the cost of the work by a sum greater than $300, as estimated by the civil engineer in charge, the same shall be ascertained by a board to consist of not less than three officers to be appointed under the direction of the Chief of the Bureau of Yards and Docks, and the contractor shall agree and consent that the contract price, increased or decreased by the sum so ascertained, shall, if approved by the Chief of the Bureau of Yards and Docks, be accepted in full satisfaction for all work done under the contract. For all changes estimated to cost not more than $300 the contractor shall in like manner accept the increased or decreased compensation as ascertained by the civil engineer in charge of the work, and approved or revised by the Chief of the Bureau of Yards and Docks: *Provided*, That any changes determined upon as above shall be stipulated and agreed to, in writing, by the parties to the contract: *And provided further*, That the increased or decreased cost shall be the estimated actual cost to the contractor at the time of such estimate plus a profit of 10 per cent.

21. *Contractor's responsibility.*—The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of the Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. All tools and appliances shall be subject to inspection for safety and sufficiency and allowance or rejection by the civil engineer in charge: *Provided*, That the contractor shall specifically and distinctly assume all risks of damages or injury from any cause to property or persons used or employed on or in connection with the work, and of all damages or injury to any person or property, wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the United States against all claims on account of any such damage or injury.

27. *Order, protection, and completion of work.*—The contractor shall proceed with the different parts of the work as directed by the civil engineer in charge. He shall protect his material and work from all deterioration and damage during construction, shall bear all the expense of mainte-

nance of the work until acceptance, and upon completion shall, without delay, remove his plant and all surplus material and rubbish from the site.

TEMPORARY WORKS AND PREPARATION OF SITE.

149. *Pipes, tracks, etc.*—Railroad tracks, sewers, water and other pipes, on the dock site, shall be removed by the contractor, but the railroad tracks near the quay wall and in front of the dry-dock excavation shall be left intact so as to afford passage for locomotives until the work is 75 per cent completed. The pneumatic pipes of the department of construction and repair along Dock Street, all salt-water and fresh-water pipes, and the electric subway on Dock Street, on the line of the new sewer, shall be protected from injury by the contractor during the progress of the work. He will be held responsible for and be required to repair all damages to same that may result by reason of the building of the new sewer, except that if it should be found necessary to disconnect or change the position of any pipes the Government will make the changes. When the old sewer is removed from the dock site the broken ends shall be bricked up in a substantial manner as directed by the civil engineer in charge.

196. *Sewer.*—The intercepting sewer in Dock Street, which now crosses the dock site, shall be diverted around the head of the dry dock, as shown on sheet 3. The new sewer shall have a uniform grade. Should either of the manholes now in the sewer be torn out in rebuilding it they shall be rebuilt in the new sewer in a manner to correspond with the present manholes. All transverse sewers and drains that now empty into the present sewer on Dock Street and which are disturbed shall be rebuilt so as to empty into the new sewer, as directed. Those portions of streets torn up for constructing the sewer shall be refilled and rammed, as specified herein.

197. *Platform.*—The piles shall be capped transversely with 8 by 12 inch sound spruce timbers, secured to each pile by one 7/8 by 20 inch galvanized-steel driftbolt. On these shall be laid 4 by 12 inch spruce planking, close together, and fastened to each cross cap by two 9-inch wharf spikes to each plank.

198. *Curves.*—Whenever the sewer deviates from a straight line such deviations shall be true arcs of circles. The templets for the inverts shall be so arranged and the centers so constructed as to conform accurately to the given radii.

271. *Examination of site.*—Intending bidders are expected to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals.

274. *Information.*—For any further information needed by intending bidders, application should be made to the Chief of the Bureau of Yards and Docks or to the Commandant of the New York Navy Yard. Any discrepancies or omissions noted by intending bidders in plans or specification should be promptly referred to the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., for correction or interpretation before the letting.

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NOS. [redacted]

IN THE

Supreme Court of the United States

THE UNITED STATES, APPELLANT,

v.

GEORGE B. SPEARIN.

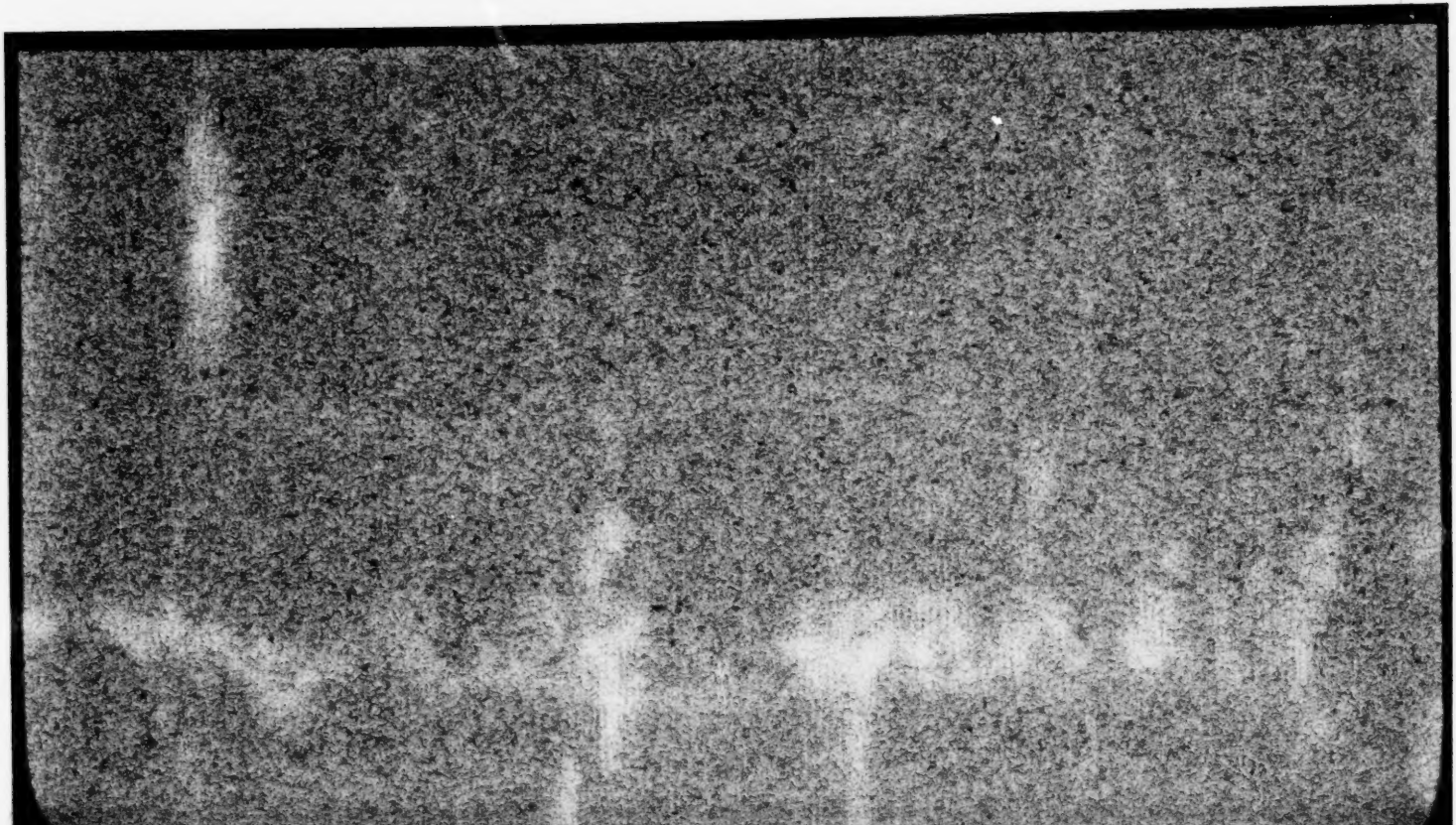
GEORGE B. SPEARIN, APPELLANT,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR CLAIMANT, GEORGE B. SPEARIN



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CITATIONS.

APPENDIX.

This brief includes the argument for George B. Spearin, appellant, as well as that for George B. Spearin, appellee, the argument for him as appellant being embraced in Point VIII, page 58, while that for him as appellee is embraced in Points I to VII, pages 4 to 57. The brief contains no statement of the case for the reason that such statement is contained in the brief for the United States, and is not controverted.

IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant,
v.
GEORGE B. SPEARIN. } No. 288.

GEORGE B. SPEARIN, Appellant,
vs.
THE UNITED STATES. } No. 289.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR CLAIMANT, GEORGE B. SPEARIN.

BRIEF OF ARGUMENT.

I.

The plan for the construction of the dry dock was defective in that it provided for building at the head of, in close proximity to, and circling around, the excavation which was about to be made for the dry dock, a brick sewer which was of insufficient size to carry away the volume of water flowing into it at times of heavy rain fall, and was, therefore, subject to internal pressure.

II.

At the time he entered into the contract for the construction of the dry dock the claimant was not informed, nor had he any knowledge, of the insufficiency of the six-foot sewer which he was required by his contract to divert and reconstruct around the head of the dry dock, nor was there anything in the conditions at the site of the work or in the circumstances connected with the making of the contract, to put him upon inquiry with reference thereto.

III.

The United States must be held to have known when they entered into the contract with the claimant for the construction of the dry dock, that the six-foot sewer which they required to be diverted by the claimant and reconstructed around the head of the dry dock was subject to internal pressure at times of heavy rain fall, and they also must be held to have known that it was liable to burst from that cause, for the reason that, as required by the plans and specifications which they themselves prepared, it was built of brick, and brick sewers are not designed to resist internal pressure.

IV.

The claimant fulfilled his contract by building the six-foot sewer in accordance with the plans and specifications which had been prepared and furnished him by the defendants, and he was not responsible for the subsequent bursting of the sewer because of a defect in its design, as he was not the author of the design.

V.

The sewer having been constructed by the claimant in strict accordance with the plans and specifications prepared by the defendants and having been approved, accepted and paid for by the defendants, the action of the defendants requiring the claimant to repair the sewer after it had broken from internal pressure and to proceed with the construction of the dry dock without any change in the design of the sewer under penalty of forfeiture of his contract, amounted to a breach of the contract on the part of the defendants which entitled the claimant to stop work and sue for labor performed and materials furnished by him in carrying out the contract, together with prospective profits.

VI.

The defendants impliedly warranted the sufficiency of the plan for the construction of the dry dock by the claimant under his contract.

VII.

The claimant was justified in suspending the work of construction of the dry dock when the six-foot sewer burst from internal pressure and in refusing to proceed until the unsafe conditions created by the defective design of the sewer and demonstrated by its bursting had been remedied by the United States.

VIII.

The case should be remanded to the Court of Claims with directions to ascertain the amount of claimant's expenditures in the performance of his work under the contract instead of the value of the work as found in Finding XII (Rec. 18).

ARGUMENT.

I.

The plan for the construction of the dry dock was defective, in that it provided for building at the head of, in close proximity to, and circling around, the excavation which was about to be made for the dry dock, a brick sewer which was of insufficient size to carry away the volume of water flowing into it at times of heavy rain fall, and was, therefore, subject to internal pressure.

That this sewer was of insufficient size had been fully demonstrated before the execution of claimant's contract by the fact that it "had overflowed at sundry times as the result of sudden and heavy downpours of rain, causing the water to flow out from the man holes, catch basins, and other outlets, * * * and flooding the lower portions of the Navy Yard, and contiguous portions of the City of Brooklyn" (Finding VI, Rec. 16).

This six-foot sewer had a capacity of about 124 cubic feet per second (Finding IV, Rec. 15). Just east of the dry dock it intersected a seven-foot sewer which had a capacity of about 423 cubic feet per second, making the combined capacities of the two sewers about 547 cubic feet per second. Before the signing of the contract a dam had been erected in the seven-foot sewer from 5 to 5½ feet high which diverted the water from that sewer into the six-foot sewer until it rose high enough in the seven-foot sewer to

pass over said dam (Finding IV, Rec. 15). This damming up of the seven-foot sewer threw practically all of the flow of water in both sewers into the six-foot sewer. The result was that the six-foot sewer which had a capacity of about 124 cubic feet of water per second, was obliged to do the work of two sewers having a combined capacity of about 547 cubic feet per second, and was therefore greatly overtaxed. The consequence was very severe internal pressure upon the six-foot sewer and this pressure it was not able to resist because it was built of brick, and brick sewers are not designed to resist internal pressure (Finding III, Rec. 14). It was built of brick because the plans and specifications annexed to claimant's contract, and which had been prepared by the defendants, required that it should be built of brick (Findings III and V, Recs. 14, 15). The plans and specifications fixed both the size and the material of which it should be built. (Finding V, Rec. 15) says, "The character of construction provided for said diverted section of the six-foot sewer being identical with that of the old sewer both as to its size and material", and (Finding III, Rec. 14) states the size of the old sewer to be six feet and that it was of brick construction. The sewer not being large enough to carry off the water which flowed into it at times of heavy rain fall, was subject at such times to internal pressure, and being built of brick it was not able to withstand that pressure. It was an error of design to place at the head of the excavation proposed

to be made for the dry dock a sewer built of brick which was subject to internal pressure, because the moment such pressure was applied it was liable to burst at the sides and allow the water to flow from the openings thus made down into the excavation for the dry dock. This excavation was only about 37 to 50 feet distant from the diverted section of the sewer (Finding V, Rec. 15) and there were numerous and important buildings belonging to the government in which shops and work rooms of various kinds were located at distances from the site of the dry dock ranging from 150 to 300 feet (Finding II, Rec. 14). The danger was that when the sewer burst open at the sides and allowed the water to run down into the dry dock excavation the banks surrounding the excavation would be washed away, thereby undermining the foundations of the government buildings and destroying much government property as well as claimant's plant engaged in the work of constructing the dry dock.

Accordingly, the Court has found (Finding X, Rec. 17) that after the bursting of the sewer on August 7th, 1906, as a result of internal pressure caused by a heavy down fall of rain occurring at that time, "it was unsafe to the contractor's and the government's property for the contractor to proceed with the contract work with the six-foot sewer in its then condition."

II.

At the time he entered into the contract for the construction of the dry dock the claimant was not informed, nor had he any knowledge, of the insufficiency of the six-foot sewer which he was required by his contract to divert and reconstruct around the head of the dry dock, nor was there anything in the conditions at the site of the work or in the circumstances connected with the making of the contract, to put him upon inquiry with reference thereto.

Finding VI, Rec. 16, expressly states that "the claimant had no knowledge of, nor did he or his representatives make any inquiry concerning, said sewers or the overflowing or capacity of or internal pressure in either of them. He was not informed of the fact that said sewers had overflowed by said officer in charge or any one else".

It is contended, however, that it was his duty to inquire before he entered into his contract whether the sewer was or was not sufficient, and that paragraphs 271 and 274 of the specifications annexed to and forming part of the contract expressly made it so.

Paragraph 271 provides, "Intending bidders are expected to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals". And paragraph 274 provides, among other things, that "For any further information needed by intending bidders, application should be made to the Chief

of the Bureau of Yards and Docks, or to the Commandant of the New York Navy Yard".

It is said that the claimant ignored the reasonable requirement of these paragraphs to seek information before making his bid, as well as the provisions of paragraph 25 of the specifications requiring the contractor to "check all plans furnished him".

Substantially the same provisions were contained in a contract before the New York Court of Appeals, in the case of *Horgan* vs. *The Mayor, &c., 160 N. Y. 516.*

In that case the contract provided that the contractor should clear and concrete the bottom of a park lake for the City of New York, and that he should drain off all the water from the bottom during the progress of the work; also that he should satisfy himself by personal examination of the location of the proposed work and by such other means as he might prefer, as to the nature and amount of work to be done. There was an outlet pipe in the bottom of the lake, the gate of which only was visible on the contractor's personal examination of the proposed work. When he attempted to let off the water by means of this pipe during the progress of the work it proved to be obstructed and failed to remove the water for a considerable depth. The contractor was consequently obliged to pump out the water, and for so doing he sought to recover from the city as for extra work.

The Court held that it was not contemplated by the contract that the contractor should pump out the

water of the lake; that he could properly assume that the water could be discharged through the outlet pipe which the city had constructed for that purpose, and that he was entitled to recover as for extra work the cost of the pumping made necessary by the failure of the city to have the outlet pipe in working order. The Court says at page 521 of the opinion,

> "The contention of the learned corporation counsel is, that by the terms of this contract the plaintiff was bound by his personal inspection of the location of the proposed work, and by subdivisions 1, 2 and 5 of the specifications already quoted, to remove all the water in the pond if necessary. In other words, that if the outlet pipe had been so obstructed as not to draw any water from the pond, it was, nevertheless, incumbent upon the plaintiff to have it removed in some manner.
>
> We do not think this is a reasonable construction of the contract. It was of course impossible when the plaintiff went upon the ground to examine the proposed work to see more than the outlet gate and the size thereof; whether the sewer lying beyond was in a condition to carry off the water was something that he could not ascertain by a mere inspection of the premises.
>
> A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water in a general sense. * * * It was proper for plaintiff to assume that the water of the lake could be

discharged into the sewer through the outlet the city had constructed for that purpose."

The clauses in the contract requiring the contractor to make personal examination of the site and to seek information and to check all plans are too general in their nature to impose upon an intending bidder the obligation to make special inquiry as to whether a sewer is properly designed, whether it performs the functions which a sewer is intended to perform. He has the right to assume that it is properly designed and that it does perform its functions. The object of a sewer is to carry water and sewage to a designated outlet and discharge them at that outlet. If it discharges its contents through man holes and catch basins out into the adjacent streets it fails to accomplish the purpose for which it was intended. This is not the case with natural conditions as in the *Simpson case, 172 U. S. 372,* as to which one would have no right to indulge in any presumptions. It is a case of artificial conditions designed and created by man in order to accomplish a particular object, and one has the right to assume in such a case that everything has been done that was necessary to be done to accomplish that object. The difference between the two cases is well illustrated by the difference between a river in its natural state and a sewer constructed by man. In the case of a river one would have no right to assume that it would not overflow its banks, for it is well known that rivers frequently do this and cause great destruc-

tion. Every one therefore doing work in the vicinity of a river who is likely to be injured by such an overflow is put upon inquiry as to whether the river ever does overflow, and has no right to assume that his attention will be specifically called to it without such inquiry. In the case of a sewer, on the contrary, which is designed and constructed by man to carry water and sewage to a specified place of deposit, one would have the right to assume that the design and construction of the sewer were proper and adequate to accomplish that purpose, and that the sewer would discharge its contents at the outlet where they were intended to be discharged, and not through man holes and catch basins which were designated and intended for an entirely different purpose. Such an overflow would demonstrate that the sewer was defective, and no one is under a duty, or has the right, to assume that another will design and construct a defective sewer, liable to burst from internal pressure whenever there is a heavy fall of rain, or that having so designed it he will deliberately place it in a location where it will do a vast amount of damage in case it does burst.

In the case of *Sundstrom* vs. *State, 213 N. Y. 68,* the claimants were the contractors for the construction of a section of the barge canal which was situated near the old Champlain Canal previously built by the State. In the course of construction of the barge canal a leakage and overflow occurred from the Champlain Canal into the barge canal saturating the soil where the work was going on and causing additional expense to the

claimants for which they made claim against the State. The Board of Claims found that these leaks "were due to lack of repair and defective condition", and that the State was liable to the claimants for the additional expense caused thereby. The Appellate Division of the Supreme Court reversed this on the ground that it was the claimant's duty to satisfy himself of the character of the work and that he took the risk of unforeseen conditions which might render it more difficult or expensive. The Court of Appeals reversed the Appellate Division on this point, saying at page 74 of the opinion:

> "We do not think it is an adequate answer for the State to say that it was possible for the claimants by sufficient examination of the old canal or the adjoining land to have ascertained that leaks had occurred in the past and would occur in the future. They were not bound to carry their investigations so far. They were under no duty to be on their watch in order to discover whether the state had been negligent in the discharge of its own duty. If they had knowledge of the defects they should be held to have assumed the risk. If they did not have knowledge, it is not sufficient that they could by diligent effort have acquired it."

The learned Assistant Attorney General says in his brief (p. 8) that it was a matter of common knowledge that heavy down pours in former years repeatedly caused the water to flow out from the man holes, etc., citing Finding VI (Rec. 16) to sustain this assertion;

and he repeats this statement as to common knowledge on several subsequent pages of his brief; but Finding VI, Rec. 16, does not state that this overflowing of the sewer through the man holes was a matter of common knowledge, but merely that, "said conditions of overflow were generally known to persons living in the vicinity of said area", which can hardly be said to make out a case of common knowledge. If it were only known to people living in the vicinity of the area there could be no presumption that the claimant knew about it unless he was shown to have lived in that vicinity, which was not shown, and could not be because it was not the fact. Moreover, it can not be said that an overflow of a sewer used to drain a comparatively small area of the City of Brooklyn was a matter of common knowledge so that all the world, including the claimant, is to be presumed to have had knowledge of that fact. The area was too local and circumscribed to create a presumption of knowledge of the conditions there on the part of the claimant, or any one else whose attention had not been especially directed to it. The fact that the claimant worked on this site about eighteen months, of which twelve months were after the sewer had been constructed, without the slightest inconvenience from overflows or from any insufficiency of the sewer, shows that the overflows occurred only at rare intervals. Therefore it could not have been a matter of common knowledge that heavy down pours of rain in former years had repeatedly caused the water to flow out from the man holes etc.

It is said in *Sundstrom* vs. *State* (*supra*), at page 74,

> "Of course, if the conditions were such that the leaks could have been observed and especially if seepage from all canals is a matter of common knowledge, the inference would be permissible even in the face of the claimant's denial that they were observed. That would be an inference of fact which we have no right to draw and which must be drawn if at all by the tribunal to which the power to pass upon the facts has been committed."

In the case at bar, no such inference has been drawn by the Court of Claims, the tribunal to which has been committed the power to pass upon the facts. That Court has not found that the overflowing of the sewers was a matter of common knowledge and has expressly found that the claimant had no knowledge of such overflowing.

The learned Assistant Attorney General says in his brief (p. 8), "While appellee had no knowledge and made no inquiry concerning the overflow of the sewers or the internal pressure, he could have learned this *as other bidders did who made inquiries about the same*".

The findings do not state that other bidders made inquiries, but only that "some other bidders were so informed" (Finding VI, Rec. 16).

He also says (p. 8) that "the dam in the 7-foot sewer was not shown on any of the city maps nor was

its presence actually known (Finding VI, Rec. 16) *to any of* the Government's officers or agents".

That finding reads "nor was its presence actually known to any of the defendants' officers or agents concerned with said contract or the making of said plans".

It may have been known to other Government officers or agents with whom those concerned with the making of the contract and plans were in communication, for, as is said in the opinion of the Court of Claims (p. 8):

> "It was, of course, beneath ground and unobservable and had doubtless been constructed by the defendants to do the very thing it did do, divert the sanitary sewage which should have passed through the 7-foot sewer into the 6-foot sewer. Governmental surroundings in close proximity to the mouth of the 7-foot sewer sustains an inference that the dam and the small drain pipes were designedly prepared to take care of the offense likely to be occasioned by the great amount of sewage certain to be deposited in Wallabout Basin."

He further says (p. 12) "numerous suits had been brought against the City of Brooklyn * * * on account of alleged damage done from overflow of these sewers". There is nothing in the findings to support this statement.

While it is true that the specifications provide that intending bidders are expected to examine the site of the proposed dry dock, etc., there is nothing in the

specifications that even by inference intimates that "the site of the proposed dry dock" is to be construed to include all that portion of the drainage area and sewer system of the City of Brooklyn that was in the vicinity of "the site of the proposed dry dock". On the contrary, it is a fair inference from section 6 of the specifications that the contractor's investigations were to be confined within certain specified limits. That section provides that "The contractor will be allowed * * * a clear space at the site of the work included within the limits of the line shown on sheet 1" and requires him to "confine both employees and material to the space assigned". In performing his contract he would have no right to go outside of this enclosure for any purpose, and there is no reason for his going upon prohibited territory in informing himself so as to bid for the work. This was a distinct notice to keep within the prescribed limits and there was nothing within these limits that would have given him any information as to the abnormal demands upon the six-foot sewer.

It is said in the brief of the learned Assistant Attorney General (p. 14), "In the present case there was no misrepresentation in the contract or specifications and the facts were presumed to be within the knowledge of appellee." But with regard to the dam in the seven-foot sewer there was a positive misrepresentation.

This seven-foot sewer is shown on the plans annexed to the claimant's contract but is entirely out-

side the limits of the space set aside and enclosed by the defendants for the performance of the claimant's work; so that the claimant had no control whatever over it and no excuse for making an examination of it to ascertain its condition. It was entirely upon the property of the defendants and subject to the defendants' control. This seven-foot sewer intersected the six-foot sewer at a point southeast of the dry dock, the point of intersection being also outside the limits of claimant's enclosure, but upon the property of the defendants (Finding III, Rec. 14). Apparently, according to the plans, it acted as a relief for the six-foot sewer. As matter of fact however, a dam had been erected in this seven-foot sewer just below its junction with the six-foot sewer, from 5 to 5½ feet high, so that while, if left free and unobstructed, it had a capacity of about 423 cubic feet per second, its capacity was reduced by this dam to practically nothing. "The damming up of the seven-foot sewer threw practically all of the flow of water in both sewers into the six-foot sewer" (Finding IV, Rec. 15), thus compelling it to carry about 547 cubic feet per second, whereas its normal capacity was only about 124 cubic feet per second. In other words, it was compelled to carry more than four times its capacity. The inevitable result was that in times of heavy rain that portion of the six-foot sewer below its junction with the seven-foot sewer, being the portion extending through the dry dock site, was subjected to a most severe internal pressure which manifested itself by a

flow of water from the man holes, catch basins, and other outlets of each of said sewers, flooding the lower portions of the Navy Yard and contiguous portions of the City of Brooklyn.

Now, there is no pretense that the existence of this dam in the seven-foot sewer which practically destroyed its usefulness as a sewer was made known to the claimant at the time he signed his contract or that he ever knew of its existence until he found it out by his own investigation made after the six-foot sewer had burst for the purpose of ascertaining the cause of such bursting. There was nothing on the plans or in the specifications or in the surrounding conditions to suggest to his mind the existence of any such dam. On the contrary the presence of the sewer itself negatives the idea of a dam in it because a dam destroys the very purpose for which the sewer was created. The purpose of the sewer was of course to provide an unobstructed passage for the flow of water, and to dam it up was to deprive it of all its usefulness and to destroy the very purpose of its existence. But there was something more than the mere existence of the seven-foot sewer which the claimant was entitled to rely upon when entering into his contract, there was also a positive representation on the part of the defendant that this seven-foot sewer was open and unobstructed. This representation is made on Sheet 1 of 14 of the plans annexed to claimant's contract for the building of the dry dock in question. On this sheet the seven-foot sewer is shown unobstructed by any

dam. There is not a line or a mark on it which would indicate the presence of a dam in the sewer but on the contrary in the place where the dam actually was, the plan shows an open and unobstructed space giving a free flow of water for the whole capacity of the sewer. This plan therefore constituted a positive misrepresentation as to a material fact which was of vital importance to the claimant in the performance of his contract. It was of vital importance because the presence of this dam in the seven-foot sewer threw an abnormal and unendurable load upon the six foot sewer, and especially upon that portion of the six-foot sewer which the claimant was required by his contract to construct around the head of the dry dock.

The learned Assistant Attorney General in his brief (p. 7) says that the specifications in this case contain a warning to intending bidders to examine the site and inform themselves of the conditions; also a statement that the contractor would be held responsible for the entire work until final acceptance of the dry dock and that he was to assume all risks of damage from any cause to property or persons in connection with the work; that he was thereby required to protect from injury all pipes along the line of the new sewer and repair all damages to same that might result from the building of the new sewer; that paragraphs 196-198 of the specifications together with the plans were sufficient to inform the intending bidder of the character of construction of the new section of the six foot sewer, of its location, its probable effect upon the convenience

and economy of doing the work and of its ultimate stability as a sewer, and he argues from all this that the claimant was put upon inquiry.

But there is not a word in the specifications that hints at the fact that this six-foot sewer was taxed to the extent of more than four times its capacity and was therefore subject to a most severe internal pressure; not a hint that there was a dam in the seven-foot sewer which practically destroyed its usefulness as a sewer and threw into the six-foot sewer all the volume of water which the seven-foot sewer was designed, and was naturally to be expected, to carry. There is not a suggestion in the specifications that the six-foot sewer had sometimes overflowed through its manholes or had shown signs of being subjected to internal pressure. To place at the head of this dry dock a brick sewer which was subject to severe internal pressure at times of heavy rain fall was a defect in design because brick sewers are not able to resist internal pressure and will almost inevitably burst open if subjected to it.

There is nothing in these specifications to put the claimant upon inquiry as to this vital defect in defendant's design and the claimant was not called upon to make such an inquiry. On the contrary he had the right to assume that the design was adequate and safe and that his contract could be carried out and the dry dock constructed by following the plan.

It is well settled that a contractor does not assume risks incident to a defective design where that design

was prepared by the other party to the contract and the contractor was required by the terms of his contract to follow it and did follow it.

MacKnight Flintic Stone Co. vs. *The Mayor, &c., of the City of New York, 160 N. Y. 72, and cases therein cited.*

Claimant had the right to assume that this sewer was designed upon well established engineering principles and that it would not be subjected to any internal pressure. Neither was there anything in the fact of the location of this sewer at the head of the dry dock which would convey to the mind of a person of ordinary intelligence an intimation that it might be subjected to internal pressure.

The learned counsel for the United States argues in his brief (p. 9) that the danger from the location cannot be dissociated from the danger which arose from internal pressure and that inasmuch as claimant knew and assumed the risk of location therefore he must be held to have assumed the risk of internal pressure. But the two ideas "location" and "internal pressure" have no relation to each other and information in regard to one conveys no warning to the mind as to the existence of the other.

He further says in his brief (p. 11) that if the sewer was of insufficient size the fault was not that of the United States; that the United States had nothing to do with designing it or determining its size or capacity or the amount of territory which it should drain.

This ignores the fact that the contract between the claimant and the defendant expressly requires the claimant to build this sewer for the defendant and the defendant to pay the claimant for such construction (Paragraphs 8 and 9 specifications); that the plans and specifications annexed to the contract provide specifically and accurately for the manner in which it should be built, specifying the material of which it should be constructed, its location and direction, its size and thickness and all the details of its construction. The plans and specifications provide that the sewer shall be built of brick; that it shall be six feet in diameter and that it shall be located at the head of the dry dock in a place specifically and accurately designated on the plans.

As between the United States and the Claimant therefore this sewer belonged to the United States; it was constructed by the claimant on the property of the United States, in accordance with a contract with the United States; it was paid for by the United States and all the responsibilities growing out of its construction arose solely between the United States and the claimant. See the case of *Sundstrom* vs. *State of New York, 213 N. Y. 68,* above cited.

III.

The United States must be held to have known when they entered into the contract with the claimant for the construction of the dry dock, that the six-foot sewer which they required to be diverted by the claimant and reconstructed around the head of the dry dock was subject to internal pressure at times of heavy rain fall, and they must also be held to have known that it was liable to burst from that cause, for the reason that, as required by the plans and specifications which they themselves prepared, it was built of brick, and brick sewers are not designed to resist internal pressure.

The section of the sewer which the claimant was required to divert was in the Brooklyn Navy Yard and on the property of the defendants (Finding III, Rec. 14), and the lower portions of that yard had been flooded at sundry times for a number of years prior to the date of the advertisement inviting proposals for the construction of the dry dock by water flowing from man holes, catch basins, and other outlets from such sewer (Finding VI, Rec. 16). "Said conditions of overflow were generally known to persons living in the vicinity of said area, and were known to Mr. Hollyday, the officer in charge of said work at the Navy Yard, to his subordinates, and other persons in and about the Navy Yard, as well as to the civil engineer in charge of the Brooklyn sewer system" (Finding VI, Rec. 16).

The overflowing of water through man holes, catch basins, and other outlets of the sewer was a conclusive demonstration that it was subject to internal pressure,

and the findings of the Court of Claims as above recited bring home to the defendants knowledge of that fact. Although the sewer was a city sewer and drained a considerable portion of the city of Brooklyn, yet that part of the sewer which the claimant was required to divert was on the property of the defendants and was subject to their control, as is shown by the fact that they undertook by their contract with the claimant to change its location, and further undertook through other contractors after the forfeiture of claimant's contract to change its design and the character of its construction (Finding XIII, Rec. 19). This finding describes the changes that were made by the defendants in the plan of the dry dock after claimant's contract was forfeited, the last change involving the omission of the sewer around the head of the dock entirely. The finding further states that "the damaged six-foot sewer was removed from the site and its exposed ends made as nearly water tight as possible by the erection of sluice gates therein and reinforced concrete bulkheads, and the flowage of water through the same entirely stopped during the continuance of the work under this contract, the dam having been previously removed from the seven-foot sewer" (Finding XIII, Rec. 19).

Wherever the ownership of this sewer may have rested, the conduct of the defendants both before and after the forfeiture of claimant's contract shows that they had absolute control over it and the power to make whatever changes in it they might deem to be neces-

sary to insure the safety of the dry dock construction. Finding X, Rec. 17, shows also that the defendants absolutely refused to make these changes for the claimant, although as appears by Finding XIII, Rec. 19, they subsequently made them for other contractors who completed the construction of the dry dock after the claimant's contract had been forfeited.

Objection is made to Finding XIII that it relates to matters occurring after the forfeiture of claimant's contract, and is therefore *ex post facto* as to the issues involved in this action. But it is nevertheless admissible for the purpose of showing the control which the defendants were able to exercise and actually did exercise over this sewer and refutes the suggestion that because it was a city sewer, therefore the defendants had no right or power to change its design.

In *Morrell* vs. *Peck, 88 N. Y. 398,* Finch, *J.*, says, delivering the opinion of the Court (p. 401),

> "The judgment at the Circuit in favor of the plaintiff was reversed by the general term solely for the reason that evidence was admitted against defendants' objection, of the erection of a railing along the south side of the bridge the day after the accident, and was considered upon the question of negligence. The evidence was offered by the plaintiff, not generally, but for two purposes only which were explicitly stated. These were to show that the defendants exercised control over the bridge, and that they had sufficient funds at the time of the accident to pay for the protection con-

structed the next day. The Court received it, when offered, for the first only of these purposes, adding: 'I do not receive it for the purpose of showing negligence, whether it is any evidence that they had funds.' The expression here is to be noticed in view of what happened at the close of the case. The defendants could not be chargeable with negligence for omitting to do what they had no means of doing, and their negligence neither existed nor could be proven unless they had funds in their hands. The Court therefore used the expression 'negligence' as applicable only to their having funds, and not in its broader and more general sense." * * *

(p. 403.) "We think, therefore, there was no error in the ruling at the Circuit, and it becomes unnecessary to consider the question argued at the bar, whether the evidence was admissible generally upon the question of negligence."

See also *Sewell* vs. *City of Cohoes*, 75 *N. Y.* 45.

IV.

The claimant fulfilled his contract by building the six-foot sewer in accordance with the plans and specifications which had been prepared and furnished him by the defendant, and he was not responsible for the subsequent bursting of the sewer because of a defect in its design, as he was not the author of the design.

The bursting of the sewer was not due to any fault in construction, but solely to the fact that the sewer was not large enough to carry off the water which

flowed into it without subjecting it to internal pressure, and that it was not able to withstand that pressure because it was of brick construction, a brick sewer not being designed to resist internal pressure. The placing at the head of the dry dock, a brick sewer, subject to internal pressure which it was unable to resist, was a defect in design and the claimant was not responsible for the design.

By the provisions of the specifications (par. 8) the first work to be done by the contractor was the diversion of this intercepting sewer around the head of the dry dock, and (par. 9) he was given six months within which to complete that part of the work. The plans and specifications state with precision what kind of a sewer he is to construct, its dimensions, its material, and its location. By those plans and specifications it is provided that the sewer shall be of brick, that it shall be six feet in diameter, and that it shall be located in the place specifically and accurately indicated on the plans. Not a word is said in the contract or in the specifications as to the amount of water which the sewer shall be required to hold and carry away, nor as to the area which it shall be required to drain. There is nothing in the specifications or contract to warn the contractor, or to intimate to him in any way, that the sewer when built and completed in accordance with those plans and specifications would be of insufficient capacity to carry off the water which would come to it from the drainage area it would be required to serve; but the contractor is simply directed to build this sewer of certain dimen-

sions, of designated materials, and in an accurately defined location. He proceeded to build and did build that sewer. The work was approved, accepted and paid for by the United States. No fault has ever been found with the sewer as constructed, but, as conceded all through this case, it was a good piece of work. The bursting was not due to any fault in construction but to a defect in design. So far as this sewer was concerned, therefore, the claimant had performed his contract.

But it is contended that the substance of claimant's contract was to furnish and complete a substantial dry dock in perfect working order together with approaches, etc., and the fact that the sewer broke, from whatever cause, did not relieve him of that obligation; that the bursting of the sewer was a mere incidental difficulty occurring in the performance of the work which it was the duty of the claimant to overcome in order that he might produce the result aimed at in the contract, viz., a complete and substantial dry dock. This argument disregards a well settled distinction in the law of contracts, and that is the distinction between a case where a man agrees by his contract to produce a certain result *by means which are left entirely to him*, and a case where a man agrees to produce a certain result but *by means which the other party to the contract selects and prescribes.* In the former case he is responsible because the means of accomplishing the result were all at his command and if he chose to agree that he would produce the result he must do

it even though some difficulty which he had not foreseen prevents its accomplishment. He ought to have foreseen the difficulty and guarded against it. But in the latter case, where one party to the contract has prescribed the means by which the result is to be produced, the other party to the contract is not responsible if the means prescribed do not produce that result.

This distinction is clearly defined in the case of *MacKnight Flintic Stone Co.* vs. *The Mayor, &c., of the City of New York, 160 N. Y. 72.*

In that case the contract provided that the contractor should furnish "all the materials and labor for the purpose, and make water tight the boiler room, coal cellar, etc., of the courthouse and prison * * * in the manner and under the conditions prescribed and set forth in the annexed specifications which are hereby made part of this contract". The question presented for decision in the case was whether the contractor could recover without making the floor of the boiler room absolutely waterproof, although he had conformed in every respect to the plans and specifications. The contractor insisted that he had fully performed the contract because he had furnished all the materials of the quality required, and had done all the work called for by the plans and specifications. The City on the other hand insisted that the contractor had not completed his contract and could not recover because he had warranted that the plans and specifications when carried into effect would result in a waterproof boiler room, and that the boiler room was not water-

proof. The Court of Appeals held that the contractor had not by the provisions of the contract made himself responsible for producing a waterproof boiler room, but had only agreed to do the work in the manner called for by the plans and specifications, and if those plans and specifications did not produce the result intended by the employer the contractor was not responsible for the failure. The opinion of the Court is written by Vann, *J.*, and lays down the following as the rule covering such cases (p. 82):

> "The rule of reasonable construction governs courts in the enforcement of contracts. The contract now before us does not necessarily require the construction that the plaintiff guaranteed the sufficiency of the plan and specifications to produce the result desired, because it does not in terms so provide. There is no independent or absolute covenant to that effect. There is nothing in the subject to the contract, the situation of the parties or the language used by them, to conclusively indicate such an intention, and a fair and reasonable construction avoids such a peculiar and unjust result. The agreement is not simply to do a particular thing, but to do it in a particular way and to use specified materials, in accordance with the defendants' design, which is the sole guide. The promise is not to make water tight, but to make water tight by following the plan and specifications prepared by the defendant, from which the plaintiff had no right to depart, even if the departure would have produced a water proof

cellar. If the contractor had designed and executed a plan of its own which resulted in a tight cellar, it would not have been a performance of the contract, for it was to produce a water proof cellar by following the plan and specifications made by the defendant and not otherwise. The plaintiff was not allowed to do additional work, *according to a plan of its own*, although it claimed it would prevent all dampness, and the defendant did not attempt to remedy defects at the expense of the plaintiff, as authorized by the contract. There was no discretion as to the materials to be used or the manner in which the work should be done. The plaintiff had *no alternative except to follow the plan under the direction of the defendant's officers in charge*. The defendant relied upon the skill of its engineer in preparing the plan, with the most minute specifications, and bound the plaintiff to absolute conformity therewith. As was said in a similar case arising in Pennsylvania, 'Every line was drawn, every grade was fixed, and every detail was provided for, by the city'. (*Filbert* v. *Philadelphia, 181 Pa. St. 530, 545.*)

"This is not the case of an independent workman left to adopt his own method, but of one *bound hand and foot to the plan of the defendant*. The plaintiff had no right to alter the specifications, although the defendant had a qualified right to do so. If the plan and specifications were defective it was not the *fault of the plaintiff*, but of *the defendant*, for *it* caused them *to* be made and *it* alone had the power to

alter them. It relied upon its own judgment in adopting them, not upon the judgment of the plaintiff. It decided for itself out of what materials and in what manner the floor should be constructed, and not only required the plaintiff to use precisely those materials and to do the work exactly in that manner, but also inspected both as the work advanced without complaint or question as to either. 'If', says Mr. Parsons, 'the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose'. (1 Parsons on Contracts, 587.) The defendant specifically selected both material and design and ran the risk of a bad result. If there was an implied warranty of sufficiency, it was made by the party who prepared the plan and specifications, because they were its work, and in calling for proposals to produce a specified result by following them, it may fairly be said to have *warranted them adequate* to produce that result. If I agree to produce a certain result according to my own plan, I impliedly warrant its sufficiency; but if I agree to produce that result by *strictly following the plan prepared* by another party, *he* impliedly warrants its sufficiency. The responsibility rests upon the party who fathers the plan and presents it to the other with the *implied representation* that it is adequate for the purpose to be accomplished. A stipulation requiring a contractor to produce a certain result by following the plan and directions of the owner is an undertaking that it can be done in that way. * * *

> "The reasonable construction of the covenant under consideration is, that the plaintiff should furnish the materials and do the work according to the plan and specifications, and thus make the floors water tight so far as the plan and specifications would permit. This result finds support in the following authorities, some of which are precisely analogous while others sustain the principle adopted."

Among the cases cited by the Court as either precisely analogous or as sustaining the principle adopted is *Filbert* vs. *The City of Philadelphia, 181 Pa. St. 530.* In this case a municipal contract for the building of a reservoir provided that the material should be furnished and work performed "in strict and exact accordance with the plan on file in the department of public works and the specifications hereto attached". It also provided that the contractors were to do certain enumerated things "and all work necessary to make a complete and perfect reservoir ready for use". The reservoir was built in exact accordance with the plans and specifications, but leaked, this defect being due to the micaceous rock upon which it was built. It was contended on behalf of the City that the plaintiffs' obligation was not fulfilled by the construction of a reservoir in exact accordance with the plan and specifications, but that under the clause in the contract "all work necessary to make a complete and perfect reservoir ready for use", they were bound to construct a reservoir through which water would not percolate.

The Court held that the contract did not admit of such a construction, saying at page 544 of the opinion:

> "The contract provides that the materials shall be furnished and the work performed 'in strict and exact accordance with the plan on file in the department of public works and the specification hereto attached' * * * Under one of the thirty subheads in the specifications, the work to be done is named in one sentence as the tearing down and removal of buildings, etc., 'and all work necessary to make a complete and perfect reservoir ready for use and to leave grounds in a suitable condition'. The last clause of this sentence, which closes a description of the numerous things to be done in the construction of the reservoir and the ornamentation of the grounds with the general statement, 'and all work necessary to make a complete and perfect reservoir ready for use and to leave the grounds in a suitable condition', is the basis of the contention that it was the duty of the contractors to turn over to the City a reservoir that would not leak, although the one they constructed and delivered was in exact accordance with the plans and specifications. The leaking of the reservoir appears to have been due to the insufficient thickness of the clay bottom. The clay used would have been sufficient if it had rested upon solid rock; but the foundation of the reservoir was micaceous rock, which contained fissures, through which the water which percolated through the clay found an outlet. This defect in the reservoir was not due to defective

material or workmanship in its construction. To hold the plaintiffs answerable for it would be to hold them as warranting that the reservoir should be a perfect reservoir, notwithstanding that its defects might be due entirely to its site or to the specifications. This is precisely the position taken by the city, and it cannot be sustained."

In *Bentley* vs. *State, 73 Wisconsin, 416,* an act of the legislature authorized the construction of two transverse wings to the state capitol, one on the north and the other on the south side, to be built by contractors according to plans and specifications therein provided for. The act also required the board of commissioners therein authorized to procure suitable and proper plans, drawings and specifications for the construction of said buildings and to let the contract for their erection; also to employ an architect to superintend the work on said buildings. Pursuant to such act the board procured plans, engaged an architect, and entered into a contract with the plaintiffs whereby all the materials were to be furnished and all the work done according to the plans and specifications furnished by the board and under the direction and to the satisfaction of the architect. After the plaintiffs had constructed a large portion of one wing and the materials and work had been approved by the architect, accepted by the board, and paid for by the state, the wing fell by reason of latent defects in the plans. At the special request of the state

the plaintiffs restored the wing according to amended plans and specifications furnished by the board.

It was held, that the state warranted the sufficiency of the original plans and was liable to the plaintiffs for the expense of restoring the portion of the building so destroyed. The Court in its opinion says:

> "The case is not unlike in principle to a class of decisions frequently made by this and other courts, and recently sanctioned by the House of Lords, to the effect that where goods or machinery are ordered for particular use, to the knowledge of the manufacturer or vendor, there is an implied undertaking or warranty on his part that they will be fit for such use in the ordinary manner, and that in case of failure by reason of latent defects not discoverable by ordinary diligence upon inspection, such manufacturer or vendor is liable. *Drummond* vs. *Van Ingen, L. R. 12 App. Cas. 284.*"

In the case of *Kellogg Bridge Co.* vs. *Hamilton, 110 U. S. 108,* the Bridge Company had partially executed a contract for the construction of a bridge and had then entered into a written agreement with Hamilton for its completion, Hamilton agreeing to pay for all work done and material furnished up to that time by the Company. He proceeded with the work but in the process of completing it certain false work or scaffolding which had been previously put up by the Company for the purpose of erecting the bridge turned out to be insufficient and fell. No statement or representa-

tion had been made by the Company as to the quality of the work it had done, but its insufficiency was not apparent upon inspection and could not have been discovered by Hamilton until actually tested during the progress of the work. In consequence of this difficulty with the false work Hamilton was delayed in the completion of the bridge and subjected to increased expense, and he claimed in this action to recover the damages which he had sustained thereby. It was held that the law implied a warranty on the part of the Bridge Company that the work sold or transferred by it to Hamilton was reasonably sufficient for the purpose for which the Company knew that it was designed. Mr. Justice Harlan, delivering the opinion of the Court, says:

> "The authorities to which we have referred although differing in the form of stating the qualifications and limitations of the general rule, yet indicate with reasonable certainty the substantial ground upon which the doctrine of implied warranty has been made to rest. According to the principles of decided cases and upon clear grounds of justice, the fundamental inquiry must always be whether under the circumstances of the particular case the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own."

In all the above cases the test of responsibility was held to be, whose judgment was relied upon in the preparation of the plan or design, the one who prepared

it being held responsible for its efficiency. Applying this test in the case at bar it is impossible to assert that the claimant was responsible for the plan or design of the sewer in question for the reason that his judgment was not relied upon in any way in the preparation of it.

Although the sewer was not a part of the dry dock, yet it extended across the site of the dry dock and stood in the way of its construction and had to be removed and placed in another location in order that the work of constructing the dry dock might proceed in safety and the dry dock be secure after its completion. Accordingly, the contract provided for removing the sewer and placing it in another location, the compensation therefor to be paid out of the lump sum provided in the contract for the building of the dry dock. The plan and specifications forming part of the contract specified the exact place in which the sewer was to be built, as well as it dimensions and the material of which it was to be constructed (Finding V, Rec. 15). This plan and these specifications were prepared by the defendants and presented to the claimant as the guide by which he was required to work, and he was not consulted in any way in the preparation of them. He had no option in the matter but was obliged to follow them. The defendants relied entirely upon their own judgment as to the suitableness of the design to accomplish the purpose intended, and must take the consequences of its failure. The claimant cannot justly be held responsible for the failure of a design which he had nothing to do with preparing and whose defects he

knew nothing about until they were disclosed to him by the bursting of the sewer. The general requirement in the specifications (par. 1) that he shall provide a complete and substantial dry dock in perfect working order is to be taken in connection with the contract (par. 1) that he will "construct and complete, *according to the plans and specifications hereto attached,* * * * a dry dock", showing the intention to be that he shall provide a complete and substantial dry dock if the plans of the defendants are adequate for that purpose. *MacKnight Flintic Stone Co.* vs. *Mayor* (*supra*) and cases there cited.

V.

The sewer having been constructed by the claimant in strict accordance with the plans and specifications prepared by the defendants and having been approved, accepted and paid for by the defendants, the action of the defendants requiring the claimant to repair the sewer after it had broken from internal pressure, and to proceed with the construction of the dry dock, without any change in the design of the sewer, under penalty of forfeiture of his contract, amounted to a breach of the contract on the part of the defendants which entitled the claimant to stop work and sue for labor performed and materials furnished by him in carrying out the contract, together with prospective profits.

Finding X (Rec. 17) states that, "Immediately after said cracks in the sewer occurred it was inspected by the contractor, who thereupon wrote the defendants' officer in charge, notifying him of its condition

and stating his purpose to suspend operations and not to resume until the Government had made provision for caring for or assuming the responsibility for the damage that had been or might be occasioned by the said sewer, its insufficient capacity and location.

The Chief of the Bureau replied that the contractor was responsible for remedying the existing conditions, and that he should make good the injuries which had been caused, guard against their repetition, and proceed with his work under the contract."

First, the defendants had no right to call upon the claimant to make good the injuries which had been caused.

As we have seen, the injuries were caused by the bursting of the sewer from internal pressure due to a defect in design, and the contractor was not responsible for the design. It is contended that he is responsible because the specifications provide that the contractor will be held responsible for the entire work, and every part of it, until completion and final acceptance of the dry dock, and reference is made to other provisions of the specifications of the same nature.

In *Gearty* v. *The Mayor, 171 N. Y. 61,* the plaintiff, a contractor, was ordered by the City Engineer to take up and relay a part of the pavement which he had laid under his contract, and Bartlett, *J.,* delivering the opinion of the Court, says (p. 71):

> "It is very clear that the plaintiff could have stopped work as ordered by the engineer of construction and stood upon his contention that the

> work had been properly done, brought his action to recover for labor and materials performed and furnished under the contract, and claimed his prospective profits. (*Smith* v. *Wetmore, 167 N. Y. 234; Roehm* v. *Horst, 178 U. S. 1.*)"

In *Anvil Mining Co.* vs. *Humble, 153 U. S. 540,* performance of the work had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the Court, said:

> "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party and if such other party interferes, hinders and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense.

> It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused."

Second, the defendants had no right to require the claimant to proceed with his work under the contract without making such changes in the design or location of the six-foot sewer as would enable him to proceed in safety.

The learned Assistant Attorney General in his brief (p. 17) states in effect that the claimant did not want to repair the broken sewer and go ahead with his work because he had taken the contract at too low a figure and thought that the breaking of the sewer gave him an opportunity to escape from performing it. He asks, what was there to prevent the claimant from proceeding to reinforce the sewer so as to make it safe and continuing with the work; that this could have been done for about $3,875.

The answer to this is, that mere repairs to this broken sewer would not have made the construction of the dry dock safe, for the trouble was not in the construction of the sewer but in the design of it, and repairs would have applied to construction and not to a defect in design. Repairs to this brick sewer, subject as it was to internal pressure and to a liability to burst from that cause whenever there was a heavy fall of rain, would have left it a brick sewer still and subject as before to internal pressure and to the same liability to burst from that cause. The only way in which this defect could be remedied was by a change in the design

of the sewer either in respect to its size or in the material of which it was constructed or in locating it farther away from the dry dock. But the claimant was not at liberty to make any of these changes nor any changes whatever in the contract, plans and specifications, the right to make any such changes being expressly reserved to the defendants (Par. 17, specifications). For this reason, as appears by Finding X (Rec. 17) claimant again called upon the defendants "to make such changes in the design and location of this sewer as will make it possible to resume work with safety to my men, to my plant, and to the surrounding government property, and this dry dock". This in itself refutes the suggestion that the claimant was seeking an opportunity to escape from the performance of his contract. It shows, on the contrary, that he was making every effort to prevail upon the defendants to afford him an opportunity to perform it, his sole request being that they would make the conditions safe so that he could perform it. But the finding shows that the defendants refused to make any changes whatever in the plans and specifications and demanded of the claimant that he repair the broken sewer and proceed with the work under his contract. While the findings do not state, and the opinion of the Court of Claims disclaims any intention of finding, that the claimant could have proceeded with his work by repairing the broken sewer, yet it is a reasonable inference from the facts found that it would not have been safe for him to attempt to do so without a change in the design of

the sewer. Unless such change were made the size of the sewer and the material of which it was constructed would have remained the same and the internal pressure would have been there, whenever there was a heavy fall of rain. The Court has found that it would have been unsafe to proceed with the construction of the dry dock with the sewer in its then condition, and it is a reasonable inference from that finding which any prudent man would naturally have drawn that mere repairs to the same sewer restoring it to the same condition it was in before the break would simply invite another break from internal pressure which the repaired sewer would be no more able to resist than the original sewer.

The learned Assistant Attorney General states in his brief (p. 18) that estimating on the basis of the bids of the contractor who completed the project, the claimant should have "bid approximately $1,000,000 to do the work which the plaintiff undertook to do for $757,800". But the bids of the contractor who completed the project do not form a fair basis for estimating what claimant should have bid because the project as completed was an entirely different structure from that which the claimant agreed by his contract to construct. As appears by Finding XIII (Rec. 19) the project was completed by the Holbrook Cabot & Rollins Co., the length of the dry dock having been increased from 554 feet, as it was under the claimant's contract, to 723 feet in the Holbrook Cabot & Rollins contract. The last change involved also the omission

of piles under the dock as required by the claimant's contract and the substitution therefor of piers and anchors sunk in pneumatic caissons, the six-foot sewer being elimirated durin_ the progress of the work, and reconstructed around the head of the dock after the dock had been completed (Finding XIII, Rec. 19). The total cost of this construction was approximately $2,480,000. (Finding XIII, Rec. 19) as against $757,800. to be paid the claimant under his contract. But there is no comparison between the two structures. The dock as finally completed by the Holbrook Cabot & Rollins Co. was entirely different in size, type, and method of construction from that which the claimant had agreed to build under his contract, and cannot be used as a basis for an estimate of the cost of constructing the dock as it was to have been constructed under claimant's contract. In the matter of the foundation alone, claimant was to build a dock with a pile foundation capped with timbers and planks (specifications, pars. 33, 197), whereas the foundation of the Holbrook Cabot & Rollins dry dock was to be of piers and anchors sunk in pneumatic caissons, thereby enormously increasing the cost over the method provided in claimant's contract. In other respects also, there were such differences as to render it impossible to make any comparison between the two docks in estimating the cost of one as compared with the cost of the other.

So far as the dry dock to be constructed by the claimant is concerned, the Court of Claims has found as a fact that "the claimant if permitted to finish his

contract work would have earned a profit of $60,000." (Finding XII, Rec. 18). This finding negatives the theory advanced by the learned Assistant Attorney General that the claimant did not want to go ahead with the performance of his contract because he had taken it at too low a figure and saw that he was losing money. If the defendants believed that why did they not listen to his appeal and make such changes in the design of the sewer as would enable him to go ahead with his work in safety. It was within their power to do so as is shown by the fact that they subsequently did it after they had forfeited claimant's contract and had given the work of constructing the dry dock to the Holbrook Cabot & Rollins Co. Finding XIII, (Rec. 19), states that after the work was relet to this company the damaged six-foot sewer was removed from the site and its exposed ends made as nearly water tight as possible by the erection of sluice gates therein and reinforced concrete bulkheads and the flowage of water through the same entirely stopped during the continuance of the work under the contract, the dam having been previously removed from the seven-foot sewer, and that "after the completion of the dry dock the six-foot sewer which had been removed as aforesaid was reconstructed by the Holbrook Cabot & Rollins Co., according to plans and specifications prepared by defendants. The sewer as finally constructed was made of reinforced concrete five-feet wide and six-feet high, rectangular in shape, the concrete being reinforced by twisted steel rods three-quarters of an inch

square placed both longitudinally and transversely 18 inches apart on the sides and 36 inches at the top and bottom. The side walls were 6 inches thick, the bottom 8 inches, and the top 10 or 12 inches,—a detailed construction designed to resist internal pressure."

If the defendants had made these changes in respect to this sewer when the claimant stated his unwillingness to resume work under his contract until the menace from the sewer had been removed, all the objections advanced by him to such resumption would have been obviated. One of these changes was the removal of the sewer entirely from the site until after the construction of the dry dock. This alone would have made the construction of the dry dock safe so far as the sewer was concerned, which was all that claimant asked as a condition of resumption of his work. Why then did not the defendants do for the claimant what they subsequently did for other contractors in order to render safe the prosecution of the work? It was not from lack of power, for they could have done it at the time when the claimant asked it as well as subsequently. It is suggested at page 11 of the Assistant Attorney General's brief, that if this sewer was of insufficient size it was not the fault of the United States; that the United States had nothing to do with designing it, etc. But the United States had the power to remove it entirely from the site, thereby eliminating it as a menace to the work while the work was going on, and it also had the power to change its size and shape and the material of which it was constructed, for Finding

XIII (Rec. 19), shows that it did all of these things after claimant's contract had been forfeited. It becomes therefore immaterial to inquire whether the insufficient size or capacity of this sewer was the fault of the United States. The real inquiry is, whether the United States had control over this sewer so that it could have prevented its being a menace to the construction of the dry dock by the claimant under his contract, and this inquiry is answered in the affirmative by the fact that shortly after claimant's contract was forfeited they eliminated it entirely as a menace by removing it from the site and subsequently caused it to be reconstructed of entirely different size, shape and materials, so as to obviate all danger of its bursting from internal pressure.

VI.

The defendants impliedly warranted the sufficiency of the plan for the construction of the dry dock by the claimant under his contract.

The learned Assistant Attorney General states in point Second of his brief (p. 15) that "A warranty guaranteeing the strength of the sewer cannot be read into an express contract and in its absence appellee breached the contract by refusing to continue work."

But this is not the rule of law. It is well settled that an implied warranty may attach to an express contract whether oral or in writing. The reason is that an implied warranty is a duty or obligation imposed by

law to promote the ends of justice and does not depend upon the intention of the parties. As is said in the opinion of the Court in *Carleton* vs. *Lombard, Ayres & Co., 149 N. Y. 137, 146:*

> "But the obligation attached to an executory contract for the sale of goods by the manufacturer or maker, cannot be changed by the mere fact that the contract has been reduced to writing. The writing, it is true, is deemed to express the whole agreement of the parties, but since this peculiar liability arises from the nature of the transaction and the relations of the parties, without express words or even actual intention, it will remain as part of the seller's obligation unless in some way expressly excluded. All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale."

In his brief (p. 16) the learned Assistant Attorney General quotes from Hudson on Building Contracts to the effect that the employer does not warrant to the contractor that the work can be executed according to the plans and specifications. The author cites in support of this statement the case of *Thorn* vs. *Mayor of London, L. R. 1 App. Cas. 120.* In regard to this case it is said in the opinion of the Court in *MacKnight Flintic Stone Co.* vs. *Mayor* (*supra*) that it "is quite dissimilar in its facts as well as in the governing principle. Its peculiar and unique features are well set forth by the Court in *Bentley* v. *State* (*supra*)." In *Bentley* v. *State* the Court says in its opinion in regard to this case of *Thorn* vs. *Mayor of London:*

> "The facts in that case were to the effect that the City of London desired to remove an

existing bridge over the Thames at Blackfriars, and erect a new one in its place. Accordingly its engineer prepared plans of such intended new bridge, and specifications of the works to be executed. The specifications stated, in effect, that the accuracy of the drawings of the existing bridge was not guaranteed; that the City should not be liable for any extra work in removing more than indicated in the drawings; that the contractors were to take out their own quantities, and satisfy themselves as to the nature of the ground through which the foundations were to be carried; that no surveyor was authorized to act for the City, and that no information given was guaranteed; that piers were to be put in by means of wrought-iron caissons, as shown on the drawings; that the contractors were to assume all risks and responsibility in the sinking of such caissons, and to employ their own divers or other efficient means for removing and overcoming any obstacles or difficulties that might arise in the execution of the work; that the quality of the concrete was put under the control and direction of the engineer; that extra or varied work was to be certified, accounted and paid for at prices named. Thorn, having taken the contract, entered upon the work according to such plans and specifications. After a while it transpired that such caissons were not sufficiently strong to resist the tide waters, and accordingly it became necessary to alter the plans for shutting out the water while putting in the piers. This occasioned the loss of material and work, and necessitated

extra material and work, and a considerable delay. The ordinary method at the time of shutting out such water was by means of cofferdams. The City voluntarily paid the contract price, *and also voluntarily paid for the cost of the extra work rendered necessary by such alteration of the plans, but refused to pay for the contractor's loss of time and labor occasioned by the attempt to execute the original plans,* and the action was brought to recover what the City thus refused to pay. The question presented was, whether there was any implied warranty on the part of the City that such caissons would prove efficient to shut off the water while building the piers. Each of the two courts cited above held that there was no such warranty, and hence that the City was not liable." * * *

"The facts of that case distinguish it from the case at bar in several particulars. In that case the caissons so specified were not included in the thing contracted for, but were only referred to in the specifications as a means to be employed in the construction of the piers. Here the defects and inefficiency were in parts of the structure contracted for. * * * In that case the defective parts were never accepted by the city. Here they were inspected, accepted, approved and paid for by the state. In that case the agency of the city, as to the defective parts, terminated with the drawing of the plans and specifications. Here the agency of the state continued, with the absolute right of control and supervision during the entire execution of the works. In that case the contract expressly dis-

claimed any guaranty, risk or responsibility as to several particulars, including the sinking of such caissons, and in removing and overcoming any obstacles or difficulties arising in the execu tion of the works. Here there is no such disclaimer on the part of the state, but a general assumption of the right to determine all questions relating to the material and workmanship. * * * The cases may fairly be regarded as distinguishable in their facts. Certainly we are unwilling to apply the rules there announced by some members of the Court to the facts here admitted by the demurrer. According to such facts, the state undertook to furnish suitable plans and specifications, and required the plaintiffs to conform thereto, and assumed control and supervision of the execution thereof, and thereby took the risk of their efficiency. What was thus done, or omitted to be done, by the architect, must be deemed to have been done or omitted by the state. Moreover, we must hold, notwithstanding the English case cited, that the language of the contract is such as to fairly imply an undertaking on the part of the state that such architect had sufficient learning, skill and judgment to properly perform the work thus required of him, and that such plans, drawings and specifications were suitable and efficient for the purpose designed. There seems to be no lack of able adjudications in support of such conclusions." (Citing many cases, including *Kellogg Bridge Co.* vs. *Hamilton, 110 U. S. 108.*)

The case of *Thorn* vs. *Mayor* (*supra*) is likewise distinguishable in most of the features above enumerated as distinguishing it from the Bentley case, and it is especially distinguishable in this, that in the Thorn case the caissons which proved insufficient were simply means whereby the piers for the bridge which the contract called for were to be put in, and the contract expressly provided that the contractors were to assume all risks and responsibility in the sinking of such caissons. In the case at bar, on the contrary, the sewer which proved to be defective was not a means of constructing the dry dock but an independent structure which the contract required to be removed, relocated and rebuilt in order that the work of constructing the dry dock might proceed; and the contract contained explicit directions as to removal and reconstruction of this sewer, expressly designating its size, material, and new location. There is no clause in the contract that the contractor is to assume the risk and responsibility in the removal and reconstruction of the sewer as in the Thorn case, and nothing to interfere with the application of the rule that he who prepares the plan is responsible for its efficiency.

The learned Assistant Attorney General says at page 17 of his brief, that "Appellee's contention is foreclosed by his failure to have had an express warranty inserted in the contract".

In *Kellogg Bridge Co.* vs. *Hamilton, 110 U. S.*

108, Mr. Justice Harlan says, with reference to a similar argument,

> "That he did not exact an express warranty against latent defects, not discoverable by inspection, constitutes, under the circumstances, no reason why a warranty may not be implied against such defects as were caused by the mode in which this false work was constructed. In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But, plainly, such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not if he chooses insist on an express warranty against latent defects."

VII.

The claimant was justified in suspending the work of construction of the dry dock when the six-foot sewer burst from internal pressure and in refusing to proceed until the unsafe conditions created by the defective design of the sewer and demonstrated by its bursting had been remedied by the United States.

In fact, no other course was open to him. The bursting of the sewer had demonstrated its insufficiency and its liability to burst from internal pressure, and it was apparent that in case it did burst a great

deal of damage to his own property and to that of the United States would necessarily result. That he was justified in stopping is shown by the concluding sentence of Finding X, (Rec. 17) which reads, "It was unsafe to the contractor's and the government's property for the contractor to proceed with the contract work with the six-foot sewer in its then condition."

Objection is made to this finding that "it is manifestly a conclusion" (see dissenting opinion, p. 22). But it is a fact in the case which the Court of Claims, as trier of the facts, was justified by the evidence in finding, and if it made any finding at all upon the subject it was necessary to find the ultimate fact that the sewer was unsafe, and not the evidence to show that it was unsafe. The case of *United States Smelting Co.* vs. *Parry, 166 Fed. Rep. 407,* involved the question of a master's duty to furnish to a servant a safe place in which to work. Mr. Justice Vandevanter, sitting as Circuit Judge, says in the opinion of the Court (p. 410):

> "The matter next to be considered is the admission over the defendant's objection of testimony by a practical brick mason and builder of many years' experience to the effect that a scaffold constructed and supported like the one in question was not as safe as those usually provided in like situations, but was very dangerous, because the weight of a man upon the projecting end of one of the planks was sure to make it tip. The objection made was, not that the witness was not qualified to speak as an expert,

but that his opinion was elicited upon a matter which it was the province of the jury to decide, and which they were capable of deciding without such testimony. It is true that in trials by jury it is their province to determine the ultimate facts, and that the general rule is that witnesses are permitted to testify to the primary facts within their knowledge, but not to their opinions, and it is also true that this has at times led to the statement that witnesses may not give their opinions upon the ultimate facts which the jury are to decide, because that would supplant their judgment and usurp their province. * * * The most important qualification of the general rule before stated is that which permits a witness possessed of special training, experience or observation in respect of the matter under investigation, to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion; the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness. A reference to the adjudicated cases will show the extent of this qualification, its application in actual practice, and the discretion accorded to the trial Judge in that regard. In *Transportation Line* vs. *Hope, 95 U. S. 297* * * * there was called in question a ruling of the Circuit Court whereby a witness of large experience in towing vessels, was permitted to testify that in his opinion it was not safe or prudent for a tugboat in Chesapeake Bay to tow three boats abreast, with a high wind, that being the point to be de-

cided by the jury. The ruling was sustained."
* * *

"In *Union Ins. Co.* vs. *Smith, 124 U. S. 405* * * * it was held permissible for experienced seamen to testify that under circumstances known to them, it was not the exercise of good seamanship or reasonable prudence to attempt to tow a disabled vessel out of a port of repair and safety and across Lake Erie, and this when that was the ultimate question to be decided by the jury."

In *Hartley* vs. *Eagle Ins. Co., 222 N. Y. 178*, it was held that where the Court, upon the trial of an action, instead of finding either way upon the crucial question of fact in the case simply finds the evidence as given by the witnesses upon that question, and then draws a conclusion of law which is unsupported by any finding of fact, the judgment entered thereon must be reversed.

The question whether it was safe or unsafe for the claimant to proceed with the work of constructing the dry dock with the sewer in the condition it was in after it had burst, was the crucial question of fact in the case at bar, and it was proper for the Court of Claims as trier of the facts, instead of finding the evidence which was adduced with reference to that fact, to find the ultimate fact that it was not safe.

The appeal of the defendants cannot be sustained.

There now remains the question of the appeal of the claimant.

VIII.

The case should be remanded to the Court of Claims with directions to ascertain the amount of claimant's expenditures in the performance of his work under the contract instead of the value of the work as found in Finding XII (Rec. 18).

Under the rule laid down in *United States* vs. *Behan, 110 U. S. 338*, damages for breach of contract consist, *first*, of what the claimant has already expended during the performance of the contract (less the value of material on hand) and *second*, of the profits that he would have realized by performing the whole contract.

The claimant requested the Court of Claims to find (par. 25, p. 863, Claimant's brief on amount of damages and request for findings of fact), "That the claimant paid, laid out and expended in and about the performance of the work specified in said contract and specifications the sum of $274,597.88 exclusive of interest, and received from the defendant on account of such performance the sum of $129,758.32, leaving a balance of $144,839.56 actually expended by him in and about the performance of said contract over and above all amounts received by him from the defendants on account thereof". But the Court of Claims has found (Finding XII, Rec. 18) that "The claimant paid, laid out, and expended in and about the performance of the

work specified in said contract the following sums, to wit:

Value of work and materials incorporated in the permanent structure...	$ 75,491.65
Value of materials on hand to be placed in the permanent structure.....	10,895.90
Value of plant.....	124,551.63

Making a total amount of $210,939.18, exclusive of interest.

The claimant received from defendants on account of such performance the sum of $129,758.32, leaving a balance of $81,180.86 actually expended by him in and about the performance of said contract over and above the amounts received by him from defendants on account thereof".

This finding is not in accordance with the rule laid down in *United States* vs. *Behan* (*supra*), where it was held that the damages for breach of contract consist of the amount *actually expended* in the performance of the contract and prospective profits. The value of the work is only to be taken in case the claimant has rescinded the contract. That did not occur in this case. The defendant broke the contract by preventing its performance and in such case the measure of damages is the claimant's reasonable expenditures and his prospective profits. This is explained by Mr. Justice Bradley in *United States* vs. *Behan* (*supra*), and the distinction in respect to the rule of damages between a case where there has been a rescission of the contract

by the claimant and a case where the defendant has broken the contract by preventing its performance is clearly pointed out. He says:

> "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance less the value of materials on hand; secondly, the profits that he would realize by performing the whole contract.
>
> * * * * * *
>
> "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of a contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the

party who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend, including his own services, after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract."

It will be observed that there are two rules laid down in the foregoing opinion, one applicable to a case where on being stopped in the performance of his contract a claimant has elected to rescind it. In that case he can recover only the value of his services actually performed as upon a *quantum meruit*. That rule is not applicable to the case at bar because the claimant did not elect to rescind the contract. On the contrary, he insisted upon his right to perform it and that the United States should do what he claimed they were in duty bound to do, that is, make the conditions safe in order that he might perform it. The United States refused to do anything toward making the unsafe conditions safe and declared the contract forfeited. The other rule laid down in the foregoing opinion therefore applies, and the measure of damages is the amount reasonably expended by the claimant toward the performance of his contract and the profits he would have realized by such performance.

The testimony showed that the claimant actually ex-

pended in the performance of his contract the sum of $274,597.88, and that he received from the defendant on account of said work the sum of $129,758.32, leaving a balance of $144,839.56 *actually expended by him* in the performance of his contract over and above all amounts received by him from the defendants on account thereof. This amount of $144,839.56 claimant claims should have been awarded by the Court of Claims as the amount of his expenditures over and above his receipts, which with the sum of $60,000. awarded to him by the Court of Claims as profits he would have earned if permitted to finish his contract, make together the sum of $204,839.56 instead of the sum of $141,180.86, for which the Court of Claims awarded judgment.

Wherefore, it is respectfully submitted that the decision of the lower Court should be affirmed, except that the case should be remanded to that Court with directions to ascertain the amount of claimant's expenditures in the performance of his work under the contract instead of the value of the work as found (Finding XII, Rec. 18), and to enter judgment for the claimant in accordance with the decision of that Court as so modified.

FRANK W. HACKETT,
Attorney for Claimant.

CHARLES E. HUGHES,
ALFRED S. BROWN,
Counsel.

ASSIGNMENT OF ERRORS.

The Court erred in not awarding to claimant the amount of his expenditures in the performance of his work instead of the value of his work as found in Finding XII. (Rec. 18.)

APPENDIX.

PROVISIONS OF THE CONTRACT PERTINENT TO THE ISSUES IN THIS CASE AND NOT PRINTED IN THE APPENDIX OF DEFENDANTS' BRIEF.

6. *Facilities.*—The contractor will be allowed, subject to the requirements of paragraph 30, a clear space at the site of the work included within the limits of the line shown on sheet 1, and access to the same for receiving, handling, storing, and working materials, also the use of 300 linear feet of water front at or near the dock site for establishing a dumping brow and for loading and moving materials to and from the work, but he shall confine both employees and materials to the space assigned, and shall so construct the dumping brow as not to obstruct the passage of ships to and from dry dock No. 2. Immediately upon beginning the work the contractor shall inclose a portion of this area as shown on plan with a substantial 3-plank fence satisfactory to the civil engineer in charge, and shall keep such fence in good condition during the progress of the work. Upon the completion of the work, and before final payment on account of the same, the contractor shall remove all of his surplus material, machinery, tools, etc., from the naval station.

* * * * * * *

8. *Time of commencement of work.*—Immediately after the execution of the contract the contractor shall

commence work on the intercepting sewer and the tearing down of those structures which are to be destroyed. He shall commence work on the dock structure as soon as the site shall have been sufficiently cleared, and shall continue without interruption, unless otherwise directed by the United States by its civil engineer in charge of the work or other authorized representative, or otherwise hereinafter provided.

24. *Plans.*—Fourteen sheets of plans, numbered 1 to 14, inclusive, and dated June, 1904, accompany this specification. This specification and the plans accompanying it shall be considered as supplementary one to the other, so that materials and workmanship shown, called for, or implied by the one and not by the other, shall be supplied and worked into place the same as though specifically called for by both. All detail plans that may be furnished subsequently in further amplification, as well as instructions given by the civil engineer in charge that may be necessary to more fully indicate the intention of the specification and the abovementioned plans, shall be followed and considered as though forming a part of the original contract. For all portions of the work the contractor shall submit the necessary detail plans to the civil engineer in charge to be forwarded to the Chief of the Bureau of Yards and Docks for approval, unless otherwise directed by the Chief of the Bureau of Yards and Docks, before proceeding with the work. These details shall conform to the letter and spirit of the specification, to any sup-

plementary data and instructions, and to the general and detail plans already furnished to the contractor. Plans shall be submitted to the civil engineer in charge in the form of tracings. These will be returned to the contractor, either with blue prints of same stamped "Approved" or "To be revised" as noted on the tracings. In the latter case the necessary corrections shall be made and the revised drawings submitted for approval before proceeding with the work. Approval of plans will be of a general nature and will not relieve the contractor from errors or omissions that may exist therein. The contractor shall make no changes or additions to the tracings after their approval, and shall furnish as many sets of blue prints of the approved plans as the civil engineer in charge may require.

25. *Checking plans and dimensions; lines and levels.* —The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. Figures marked on plans shall, in general, be followed in preference to scale measurements; but the contractor shall compare all plans and verify the figures before laying out the work, and will be held responsible for any errors therein that thereby might have been avoided. Large-scale plans shall, in general, govern small-scale plans. In all cases where dimensions are governed by conditions already established the contractor must depend entirely upon measurements taken by himself, scaled or figured dimensions to the contrary

notwithstanding; but no deviation from the specified dimensions will be allowed unless authorized by the Chief of the Bureau of Yards and Docks. The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications.

31. *Test of completed structures.*—After the dry dock and all appurtenances relating thereto, required by the contract, are complete in all particulars, a board of officers, appointed by the Secretary of the Navy for the purpose, will examine and test the dry dock and all accessories included under the contract. All expense of such examination and test will be borne by the Government. After the board has reported that all work called for by the contract has been completed in every particular, according to the true intent and meaning of the specification, plans, and contract, and after the report has been approved by the Chief of the Bureau of Yards and Docks, the contractor will be paid the remainder of the contract price found due according to the final accounting. For a further period of six months after the date of approval of the report of the above board by the Chief of the Bureau of Yards and Docks, the Government may test the dry dock and appurtenances under any working conditions which it sees fit; and if at the end of that time no bad workmanship, weakness, or other defect due to the fault of the contractor shall appear, the work will be accepted and the

contractor and his bondsmen will be released from further responsibility; if such defects do appear, they shall be made good by the contractor without additional compensation.

32. *Location.*—The dry dock shall be located at the United States Navy Yard, New York, N. Y., in the position shown on sheet 1.

33. *Description.*—The dry dock structure proper and approach walls shall be founded on piles and be built of concrete with a granite facing for the caisson seat, as shown on plans. The rear wall of the pump well shall have steel bars embedded in the concrete. The contractor shall construct the intercepting sewer and the approach walls on either side of the entrance as hereinafter specified and clear the site as specified hereinafter under "Removal of structures". The contract shall include all excavation, dredging, cofferdam or other temporary work, grading, crane track, including rails and switches, keel and bilge blocks, conduits, capstans, winch heads, pump well and roof, suction and discharge pipes where embedded in concrete, foundations and settings for bollards, cleats, and all material hereinafter called for by this specification or indicated on plans, and all work necessary to make the required structures complete and in efficient working order.

UNITED STATES *v.* SPEARIN.

SPEARIN *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 44, 45. Argued November 14, 15, 1918.—Decided December 9, 1918.

S agreed, for a lump sum, to build a dry-dock in a Navy Yard in accordance with plans and specifications prepared by the Government and which provided, *inter alia*, for reconstructing a sewer which intersected the site, and prescribed the new location, dimensions, and materials therefor. S rebuilt the sewer as so required, and it was accepted by the Government, but owing to a dam, unknown to both parties, existing in a connecting sewer, within the Yard but beyond the limits of the operations, and to general conditions of drainage, known to the Government but not to S, back waters burst the new sewer, during heavy rain and high tide, and flooded the dry-dock excavation, causing damage and menacing the work. S, having declined to proceed unless the Government paid or assumed the damage and made safe the sewer system or assumed responsibility for future damage due to insufficient capacity, location and design, the Government annulled the contract.

Held: (1) The provision for reconstructing the sewer was part of the dry-dock contract and not collateral to it. P. 136.

(2) The articles prescribing the character, dimensions, and location of the sewer imported a warranty that if so constructed the sewer would prove adequate. P. 137.

(3) Such warranty was not overcome by general clauses requiring the contractor to examine the site, check up the plans, and assume responsibility for the work until completion and acceptance. *Id.*

(4) Neither Rev. Stats., § 3744, providing that contracts with the Navy Department shall be reduced to writing, nor the parol evidence rule, precluded reliance on such warranty, implied by law. *Id.*

(5) The contractor, upon breach of the warranty, was not obliged to reconstruct the sewer and proceed at his peril, but, upon the Government's repudiation of responsibility, was justified in refusing to resume work on the dry-dock. P. 138.

(6) Having annulled the contract, the Government was liable for all damages resulting from the breach, including the contractor's proper

expenditures on the work (less receipts from the Government) and the profits he would have earned if allowed fully to perform. *Id.* 51 Ct. Clms. 155, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Thompson for the United States.

Mr. Charles E. Hughes, with whom *Mr. Frank W. Hackett* and *Mr. Alfred S. Brown* were on the brief, for Spearin.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Spearin brought this suit in the Court of Claims, demanding a balance alleged to be due for work done under a contract to construct a dry-dock and also damages for its annulment. Judgment was entered for him in the sum of $141,180.86; (51 Ct. Clms. 155) and both parties appealed to this court. The Government contends that Spearin is entitled to recover only $7,907.98. Spearin claims the additional sum of $63,658.70.

First. The decision to be made on the Government's appeal depends upon whether or not it was entitled to annul the contract. The facts essential to a determination of the question are these:

Spearin contracted to build for $757,800 a dry-dock at the Brooklyn Navy Yard in accordance with plans and specifications which had been prepared by the Government. The site selected by it was intersected by a 6-foot brick sewer; and it was necessary to divert and relocate a section thereof before the work of constructing the dry-dock could begin. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material, and location of the section to be

substituted. All the prescribed requirements were fully complied with by Spearin; and the substituted section was accepted by the Government as satisfactory. It was located about 37 to 50 feet from the proposed excavation for the dry-dock; but a large part of the new section was within the area set aside as space within which the contractor's operations were to be carried on. Both before and after the diversion of the 6-foot sewer, it connected, within the Navy Yard but outside the space reserved for work on the dry-dock, with a 7-foot sewer which emptied into Wallabout Basin.

About a year after this relocation of the 6-foot sewer there occurred a sudden and heavy downpour of rain coincident with a high tide. This forced the water up the sewer for a considerable distance to a depth of 2 feet or more. Internal pressure broke the 6-foot sewer as so relocated, at several places; and the excavation of the dry-dock was flooded. Upon investigation, it was discovered that there was a dam from 5 to 5½ feet high in the 7-foot sewer; and that dam, by diverting to the 6-foot sewer the greater part of the water, had caused the internal pressure which broke it. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the Government's plans and blue-prints, which were submitted to Spearin. On them the 7-foot sewer appeared as unobstructed. The Government officials concerned with the letting of the contract and construction of the dry-dock did not know of the existence of the dam. The site selected for the dry-dock was low ground; and during some years prior to making the contract sued on, the sewers had, from time to time, overflowed to the knowledge of these Government officials and others. But the fact had not been communicated to Spearin by anyone. He had, before entering into the contract, made a superficial examination of the premises and sought from the civil engineer's office at the Navy

Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers nor special enquiry into the possibility of the work being flooded thereby; and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the Government that he considered the sewers under existing plans a menace to the work and that he would not resume operations unless the Government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger or assumed responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. The estimated cost of restoring the sewer was $3,875. But it was unsafe to both Spearin and the Government's property to proceed with the work with the 6-foot sewer in its then condition. The Government insisted that the responsibility for remedying existing conditions rested with the contractor. After fifteen months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Later the dry-dock, under radically changed and enlarged plans, was completed by other contractors, the Government having first discontinued the use of the 6-foot intersecting sewer and then reconstructed it by modifying size, shape and material so as to remove all danger of its breaking from internal pressure. Up to that time $210,939.18 had been expended by Spearin on the work; and he had received from the Government on account thereof $129,758.32. The court found that if he had been allowed to complete the contract he would have earned a profit of $60,000, and its judgment included that sum.

The general rules of law applicable to these facts are well

settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day* v. *United States*, 245 U. S. 159; *Phœnix Bridge Co.* v. *United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson* v. *United States*, 172 U. S. 372; *Dermott* v. *Jones*, 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co.* v. *The Mayor*, 160 N. Y. 72; *Filbert* v. *Philadelphia*, 181 Pa. St. 530; *Bentley* v. *State*, 73 Wisconsin, 416. See *Sundstrom* v. *New York*, 213 N. Y. 68. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie* v. *United States*, 237 U. S. 234; *Hollerbach* v. *United States*, 233 U. S. 165, and *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414, 424, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the Government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the dry-dock proper. It was as necessary as any other work in the preparation for the foundation. It involved no separate contract and no separate consideration. The contention of the Government that the present case is to be distinguished from the *Bentley Case*, *supra*, and other similar cases, on the ground that the contract with reference to the sewer is purely collateral, is clearly without

merit. The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the dry-dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site,[1] to check up the plans,[2] and to assume responsibility for the work until completion and acceptance.[3] The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

Neither § 3744 of the Revised Statutes, which pro-

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[1] "271. *Examination of site.*—Intending bidders are expected to examine the site of the proposed dry-dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

[2] "25. *Checking plans and dimensions; lines and levels.*—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. . . . The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."

[3] "21. *Contractor's responsibility.*—The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. . . ."

vides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108. The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry-dock. When the Government refused to assume the responsibility, he might have terminated the contract himself, *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551–552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach.

Second. Both the main and the cross-appeal raise questions as to the amount recoverable.

The Government contends that Spearin should, as requested, have repaired the sewer and proceeded with the work; and that having declined to do so, he should be denied all recovery except $7,907.98, which represents the proceeds of that part of the plant which the Government sold plus the value of that retained by it. But Spearin was under no obligation to repair the sewer and proceed with the work, while the Government denied responsibility for providing and refused to provide sewer conditions safe for the work. When it wrongfully annulled the contract, Spearin became entitled to compensation for all losses resulting from its breach.

Spearin insists that he should be allowed the additional sum of $63,658.70, because, as he alleges, the lower court awarded him (in addition to $60,000 for profits) not the difference between his proper expenditures and his receipts from the Government, but the difference between such receipts and the *value* of the work, materials, and plant (as reported by a naval board appointed by the de-

fendant). Language in the findings of fact concerning damages lends possibly some warrant for that contention; but the discussion of the subject in the opinion makes it clear that the rule enunciated in *United States* v. *Behan*, 110 U. S. 338, which claimant invokes, was adopted and correctly applied by the court.

The judgment of the Court of Claims is, therefore,

Affirmed.

(MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.)